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HAND-BOOK

OF THE

LAW OF BILLS AND NOTES

By CHARLES P. NORTON
Lecturer on Bills and Notes in the Buffalo Law School

SECOND EDITION
WITH AN ADDITIONAL CHAPTER ON CHECKS
By WM. L. CLARK, JR.

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To

ADELBERT MOOT,

In recognition of his care and devotion
to the interests of
The Buffalo Law School,
this book is inscribed.

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HAND-BOOK

OF

NEGOTIABLE BILLS AND NOTES

CHAPTER I.

OF NEGOTIABILITY SO FAR AS IT RELATES TO BILLS AND NOTES.

1. Origin of Negotiability.
2–7. Distinction between Assignability and Negotiability.
8–9. Indicia of Negotiability.
10. Purpose of Negotiability.
11. Payment by Negotiable Instrument.

ORIGIN OF NEGOTIABILITY.

1. The negotiability of bills of exchange originates in the custom of merchants. The statute of Anne, which is declaratory of the common law, established the negotiability of promissory notes.

The law, looking at bills of exchange and promissory notes as a circulating medium, divides them into two classes—negotiable instruments and non-negotiable instruments. Negotiability is not necessary to the form or substance of a promissory note or bill of exchange.[1] The non-negotiable instrument is a mere evidence of an indebtedness, and an ordinary contract. In its transfer, the law

[1] Michigan Ins. Bank v. Eldred, 9 Wall. 544; Wells v. Brigham, 6 Cush. 6; Downing v. Backenstoes, 3 Caines, 137; President, etc. of Turnpike Road v. Hurtin, 9 Johns. 217; Kimball v. Huntington, 10 Wend. 675; Hall v. Farmer, 5 Denio, 484.

treats it in most respects as an ordinary chose in action, and subject to the general rules touching assignments. For the negotiable instrument, on the other hand, in its most common form of the bill and note, it has endeavored to construct a system of rules, which shall protect persons who take it as a circulating medium, and which it is the purpose of this treatise to point out. This we shall term "negotiability." [2]

Custom of Merchants—Law Merchant.

Bills and notes are to-day alike invested with the privileges of negotiability, but they derive it from a different origin. The historical source of the negotiability which invests bills is the custom of merchants. Notes were at first within the custom of merchants, then excluded from it. Their negotiability was however established by the statute of 3 & 4 Anne, c. 9, §§ 1–3.

The custom of merchants means a code of rules growing out of the needs of and relating to trade, which the courts administered as law distinct from the ordinary common law of England. In English law it is as old as the Magna Charta. It is recognized in the statutes of the Plantagenets and the Tudors.[3] In its origin it distinguished the contracts of foreign merchants from the contracts of ordinary individuals, construing them not according to the tenets of the common law, but according to the usages of trade.[4] This custom of regulating dealings between native and foreign merchants was extended to dealings between native merchants, but was confined to the persons of merchants, as apart from those pursuing other vocations.[5] And it was not until 1666 that courts declared that "the law of merchants is the law of the land, and the custom is good enough generally for any man, without naming him merchant." [6] Of the many customs of merchants, there were two which

[2] For a discussion of the origin, history, and purpose of negotiable instruments, see Goodwin v. Robarts, L. R. 10 Exch. 337, Johns. Cas. Bills & N. 3.

[3] Magna Charta, c. 30; Acton Burnel de Mercatoribus, 11 Edw. I; the Statute of Merchants, 13 Edw. I. See, also, 27 Edw. III. cc. 19, 20. See, also, 13 Edw. VI. c. 10, 34 Hen. VIII., cited in Brown, Abr. tit. "Customs," p. 59.

[4] Co. Litt. 182; 2 Inst. 404; Vanheath v. Turner, (Mich. Term,) Winch, 24.

[5] Eaglechilde's Case, Het. 167; Litt. 363.

[6] Woodward v. Rowe, 2 Keb. 105, 132. See, also, Anon., Hardr. 485 Mich. Term, 20 Car. II. (1668) believed to be Milton's Case, vide 1 Mod. 286; Carter

were especially the subject of judicial interpretation. They were those concerning instruments which related to the remittance of money from one place to another, and in which credit was used as a means of liquidating indebtedness, instruments, in short, which are now called the "bill of exchange" and the "promissory note." Of these, bills, and particularly foreign bills, are by far the most ancient. Anderson, in his History of Commerce,[7] speaks of one granted by the Emperor Barbarossa to the city of Hamburg in the year 1189. "I remember," said Chief Justice Holt,[8] "when actions upon inland bills of exchange did first begin; and there they laid a particular custom between London and Bristol, and it was an action against the acceptor. The defendant's counsel would put them to prove the custom, at which Hale, C. J., who tried it, laughed, and said they had a hopeful case of it. And in my Lord North's time it was said that the custom in that case was part of the common law of England, and these actions since became frequent, as the trade of the nation did increase, and all the difference between foreign bills and inland bills is that foreign bills must be protested before a public notary before the drawer can be charged, but inland bills need no protest." Between inland bills and promissory notes at first there was no distinction. Both were called indifferently bills of exchange.[9] The law considered a promissory note in the light of a bill of exchange drawn by a man upon himself, and accepted at the time of drawing.[9] And it is worthy of remark that the statement accepted by the text writers, and repeated again and again in the cases, that a promissory note was never within the custom of merchants, is incorrect.[10] It was as much a mercantile instrument as a bill of exchange. It was introduced under the custom of merchants, and it was therefore, up to the time of the famous

v. Downish (1 W. & M., anno 1688) Show. 127. See, also, complete review of the cases on this subject, Dunlop v. Silver, 1 Cranch, 367.

[7] 1 And. Com. p. 171.

[8] Buller v. Crips, 6 Mod. 29.

[9] Grant v. Vaughan, 3 Burrows, 1525, 1 W. Bl. 488; Edgar v. Chut, 1 Keb. 592, 636; Horton v. Coggs (Mich. Term, 2 W. & M. 6, anno 1683), 3 Lev. 299.

[9] Marius, in his Advice, p. 3; Lov. Bills & N., p. 22; Kyd, Bills, p. 2.

[10] Hill v. Lewis, 1 Salk. 132; Williams v. Williams (viz. Pasch. Term, 5 W. & M., anno 1692) Carth. 269; Bromwich v. Lloyd, 2 Lutw. 503.

dispute between Lord Holt and the merchants which led to the enactment of the statute of Anne, a negotiable instrument. "The reason of making the statute of Anne," says Lord Hardwicke,[11] "arose from some determinations in the beginning of her reign by Holt, Chief Justice, that no action could be maintained on a promissory note nor declaration thereupon." [12] In these decisions Lord Holt denounced promissory notes as a "new sort of specialty, unknown to the common law, and invented in Lombard street." He declared that "to allow such a note to carry any lien with it were to turn a piece of paper, which is in law but evidence of a parol contract, into a specialty." And, in defiance of established rules, Lord Holt refused to allow to promissory notes the privilege of negotiability.

Text of Statute of Anne.

At this juncture, in confirmation of the ancient rule, and to meet the rule established by Lord Holt, the statute of Anne was enacted. It is so important, and so often referred to hereafter, that space is given to it. Its most important provisions are as follows: "Whereas, it hath been held that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum therein mentioned, are not assignable or indorsable over, within the custom of merchants, to any other person; and that the person to whom the sum of money mentioned in such note is payable cannot maintain an action by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note shall be assigned, indorsed, or made payable could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same: Therefore, to the intent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner, be it enacted, that all notes in writing whereby any person shall promise to pay to any other person, his order or unto bearer any sum of money mentioned in the note

[11] Walmsley v. Child (anno 1749) 1 Ves. Sr. 346.

[12] Clerk v. Martin, 1 Salk. 129, 2 Ld. Raymond. 757; Potter v. Pearson, 2 Ld. Raym. 759.

shall be taken and construed to be payable to any such person to whom the same shall be payable; and also every such note shall be assignable or indorsable over in the same manner as inland bills of exchange are according to the custom of merchants; and that the person to whom such sum of money is payable may maintain an action for the same as he might do upon an inland bill of exchange made, or drawn, according to the custom of merchants; and that any person to whom such note is indorsed, or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, may maintain his action for such sum of money either against the person who signed the note, or against any of the persons that indorsed the same, in like manner as in cases of inland bills of exchange." Thus by the statute of Anne the negotiability of notes was established. Its principles have been followed and generally embodied in the statutes of the various states of the Union. And in the many cases which arise with reference to the negotiability of instruments in forms of notes, the point is to determine whether they were such as were within the purview of the statute of Anne, or of the statutes of the various states which have embodied the principles of the statute of Anne.

Construction of Statute of Anne.

The statute of Anne, at the hands of the courts, has been construed with great latitude, a latitude in fact which renders somewhat inconsistent and irreconcilable the theories of negotiable and non-negotiable instruments. The English courts after its enactment looked upon it as a remedial statute, as it undoubtedly was. But by a line of cases which seem to go beyond the utmost limits of its evident intendment, the courts also declared that non-negotiable notes came within the statute's provisions.[18] A payee, they decided, could maintain an action within the statute against the maker, by which was meant only that the payee could declare upon the note, under the statute, instead of declaring upon the consideration or transaction which led to its being given. This interpretation, which in its inception was possibly an adaptation of an artificial system of pleading to business needs, has resulted in confusion. In New

[18] Kyd, Exch. (1790) 65; Smith v. Kendall, 6 Term R. 123; 1 Esp. N. P. 231; Burchell v. Slocock, 2 Ld. Raym. 1545.

York,[14] for instance, it seems to be the view of the courts that non-negotiable notes differ from negotiable ones only in two main particulars. One is that the indorser is regarded as a maker or guarantor, and not as a simple indorser; the other that the equities between the parties are not a subject of set-off when the instrument is transferred to a bona fide purchaser for value before maturity. Therefore in New York the general rule of contracts, that there cannot be a recovery upon them without proof of consideration, does not obtain with non-negotiable instruments, and the non-negotiable promise to pay money is itself presumption of a consideration.[15] So, too, in Massachusetts, where, although the statute of Anne has never been enacted, its doctrines are regarded as declaratory of the common law,[16] the early English rule is followed.[17] The courts of Connecticut, however, have adopted a different rule.[18] With them, where the note is not negotiable, it is a mere contract between the original parties, not intended for transfer, and a consideration must be shown. This is more consistent with the original intention of the statute. For one of the most marked distinctions between the custom of merchants and the rules of common law was in reference to the assignment of contract rights. The custom of merchants aimed to shut out equities from following transfer. According to that custom, want of consideration was no defense to an instrument in the hands of a bona fide holder, and hence, by way of corollary, came the doctrine that an expression of consideration in the instrument itself was wholly unnecessary. But this was confined to negotiable instruments. It did not include non-negotiable ones.

[14] Maule v. Crawford, 14 Hun, 193; Lee v. Swift, 1 Denio, 565; Barrick v. Austin, 21 Barb. 241.

[15] President, etc., of Turnpike Road v. Hurtin, 9 Johns. 217; Kimball v. Huntington, 10 Wend. 675; Paine v. Noelke, 53 How. Prac. 273; 3 Kent, Comm. 77; Carnwright v. Gray, 127 N. Y. 92, 27 N. E. 385.

[16] Richards v. Barlow, 140 Mass. 218, 6 N. E. 68.

[17] Townsend v. Derby, 3 Metc. (Mass.) 363; Dean v. Carruth, 108 Mass. 242. But in Massachusetts, in case of disputed consideration, the burden of proof is on the plaintiff. Perley v. Perley, 144 Mass. 104, 10 N. E. 726; Simpson v. Davis, 119 Mass. 269.

[18] Edgerton v. Edgerton, 8 Conn. 6; Bristol v. Warner, 19 Conn. 7; Daniels, Neg. Inst. § 162; Pars. Bills & N. p. 227.

Non-negotiable Bills and Notes.

This anomalous doctrine of presumptive consideration seems not to be extended to inland bills of exchange. With them, it is necessary to aver and prove a consideration.[19] Non-negotiable bills are, in general, mere assignments or orders. A number of important distinctions between them and negotiable bills are to be pointed out: A person suing the acceptor must show funds in the acceptor's hands to pay,[20] for the agreement is not an acceptance, but a mere promise to pay, and must be based upon a sufficient consideration.[21] The acceptor cannot be sued upon the bill, but upon the promise to pay evidenced by the acceptance. The acceptor is under no general liability to pay the bill in the first instance. Non-negotiable bills are assignments in the sense that they are directions to appropriate and hold the property specified in them to the use of a third person. The third person has them thus assigned to him, and this whether they consist of the whole or part of the fund, and whether assented to or not by the drawee, as long as the drawee had notice of it.[22] They are treated as moneys or property held by the drawee for another.[23]

There are some features which non-negotiable bills and non-negotiable notes also have in common. When transferred, it is by operation of the theory of assignment, and not of indorsement,[24] and the fact of possession of either the bill or note is not evidence of such title that its mere production upon a trial is prima facie evidence of a right to recover. And, lastly, title to either a non-negotiable bill or note is subject to every equity. Under the strict common-law rule the indorsee of a bill or note, in its terms not negotiable, may sue his immediate indorser in his own name, but he can only

[19] Raubitschek v. Blank, 80 N. Y. 479; Averett v. Booker, 15 Grat. 163; Wells v. Brigham, 6 Cush. 6.

[20] Munger v. Shannon, 61 N. Y. 251.

[21] Atkinson v. Manks, 1 Cow. 691.

[22] Morton v. Naylor, 1 Hill, 583; Mandeville v. Welch, 5 Wheat. 277; Row v. Dawson, 1 Ves. Sr. 331; Lett v. Morris, 4 Sim. 607; Brill v. Tuttle, 81 N. Y. 457; Ehrichs v. De Mill, 75 N. Y. 370; Robbins v. Bacon, 3 Greenl. 346; Bank of Commerce v. Bogy, 44 Mo. 18.

[23] Lowery v. Steward, 25 N. Y. 239, 243.

[24] An assignment, as applied to bills and notes, is the transfer, by writing, of an interest therein. Franklin v. Twogood, 18 Iowa, 515.

sue the maker or remote indorser in the name of the original payee, except where special statute otherwise provides. The indorser of paper not negotiable is only responsible to parties not immediate where he especially contracts to be so, being treated as guarantor or maker. And, lastly, an indorser of either cannot insist on demand and notice as a condition precedent.[25]

DISTINCTION BETWEEN ASSIGNABILITY AND NEGOTIABILITY.

2. Assignability pertains to contracts in general.

3. An assignment is the legal method of transferring the property or rights evidenced by the contract.

4. It is an impracticable method, as regards a circulating medium, because:

(a) Title in third parties created by assignment, as against the debtor, is not complete without notice to the debtor.

(b) No subsequent purchaser of the property or right can acquire better title than that of his immediate assignor.

5. Negotiability pertains to a special class of contracts.

6-7. Negotiability facilitates their transfer as a circulating medium, because:

(a) The bona fide possessor for value is presumed to be the true owner, and has good title.

(b) Transfer is effected by indorsement or delivery.

(c) In general, a consideration for the contractual relation is conclusively presumed as between parties not immediate.

We purpose here to state briefly the fundamental reasons why negotiable bills and notes could not readily be transferred as a

[25] Richards v. Warring, 4 Abb. Dec. 50; McMullen v. Rafferty, 89 N. Y. 456; Cromwell v. Hewitt, 40 N. Y. 491; Story v. Lamb, 52 Mich. 525, 18 N. W. 248; Shinn v. Fredericks, 56 Ill. 439; Rabberman v. Muehlhausen, 3 Ill. App. 326.

circulating medium under the rules governing the transfer of ordinary choses in action. The rights evidenced or created by ordinary contractual obligations are almost always a kind of property, having in themselves a value measured in law by the dam ages assessable upon their breach. This property may at this stage of the law pass from person to person just as any other property does. But there are well-settled rules governing such transfer, which are the outgrowth and mingling of early doctrines of the courts of common law and of equity, and at which the student must glance to understand the rules themselves. To this must also be added the statement that statutes, from time to time, have been largely instrumental in moulding these doctrines of common law and of equity into the form which the theory of assignment of choses in action presents at the present time.

Assignment.

It was probably the common-law rule in the first instance that no assignee of the benefits of a contract could sue for and recover them. The primitive view was, in the first place, that the contract created a strictly personal obligation between the creditor and the debtor, and also that the assignment of choses in action would increase litigation—a reason which led the courts to set their faces resolutely against it.[26] And whether from reasons of business expediency, or because they were influenced by equitable doctrines, is not clear, but the courts of common law at an early day modified this rule into one that for a long time prevailed, namely, that an assignment of a contract might be made, but the assignee must sue for its benefit in the name of the assignor or his representatives. The theory was that the courts of common law would so far take cognizance of equitable rights created by the assignment that the name of the assignor might be used as a trustee of the benefits of the contract for the benefit of the assignee.[27] This doctrine has been generally modified by statutes, the commonest ones, in the United States, being the provisions of the various Codes,—that "every action must be prosecuted by the real party in interest," and that the "transfer

[26] Pol. Cont. 207; Beecher v. Buckingham, 18 Conn. 110.

[27] Caister v. Eccles, 1 Ld. Raym. 683; McWilliam v. Webb, 32 Iowa, 577; Halloran v. Whitcomb, 43 Vt. 306; Fay v. Guynon, 131 Mass. 31.

of every claim or demand passes an interest which the transferee may enforce by an action in his own name, as the transferrer might have done." With courts of equity, it is true, the rule was different. For in equity, from immemorial times, the assignment of a chose in action or of the benefits under a contract has been permitted, and the assignee could maintain a suit in equity in his own name.[28] But, however salutary the operation of this equitable rule might have been in some phases of the enforcement of contract rights, it could have had little influence with bills and notes. Cases arising upon them came within the cognizance of the courts of common law. And there are cases to show that even when the assigned non-negotiable promise was to pay a sum of money to the promisee, or to bearer, or to order, or where, by any other form of words, the instrument purported to be made assignable, even then the holder could not sue in his own name, but only in that of his assignor.[29] This objection, inasmuch as it related only to the form of action, was not of importance. But were it the rule governing the transfer of negotiable instruments, it would certainly clog their circulation, since it would complicate and render less certain the recovery of judgments upon them.

There were other rules relating to the transfer of ordinary contracts, governing alike courts of common law and equity, which were of greater practical importance. The first is the doctrine of notice. The rule governing assignment, as stated in the principal text, is that title in third parties, as against the debtor, is not complete without notice to him. Naturally, as the result of this rule, follows the one that a debtor who performs his contract to the original creditor, without notice of any assignment by the creditor to another person, is released from his obligation under it.[30] An illustration of this principle is a well-known case where a bond and mortgage had been given, and assigned by various intermediate as-

[28] Smith v. Brittain, 3 Ired. Eq. 347; Tibbets v. Gerrish, 25 N. H. 41.

[29] Coolidge v. Ruggles, 15 Mass. 387; Clark v. King, 2 Mass. 524; Weidler v. Kauffman, 14 Ohio, 455; Jones v. Carter, 8 Q. B. 134.

[30] Judson v. Corcoran, 17 How. 612; Van Buskirk v. Insurance Co., 14 Conn. 141; Smith v. Ewer, 22 Pa. St. 116; Merchants', etc., Bank v. Hewett, 8 Iowa, 93; Winberry v. Koonce, 83 N. C. 351; Hobson v. Stevenson, 1 Term Ch. 203; Richards v. Griggs, 16 Mo. 416.

signments, not recorded until some nine years afterwards. At that time the mortgage was attempted to be foreclosed by the true owner. In the mean time the mortgagor had made various payments upon the mortgage, and finally had paid it up in full to the original mortgagee, some three years before the foreclosure. These payments, on the mortgagor's part, were made without notice or knowledge of the assignments. And upon these facts it was held that the mortgagor was to be protected, and would even have been protected if the assignments had been recorded, because notice must be given or brought home to the mortgagor not to pay the original mortgagee, else payments to such mortgagee on account of the mortgage are perfectly valid.[31] This is the logical outgrowth of the theory of assignment, as explained in the English case of Stocks v. Dobson.[32] "The debtor," said the court, "is liable at law to the assignor of the debt, and at law must pay the assignor if the assignor sues in respect of it. If so, it follows that he may pay without suit. The payment of the debtor to the assignor discharges the debt at law. The assignee has no legal right, and can only sue in the assignor's name. How can he sue if the debt has been paid? The law, therefore, has required notice to be given to the debtor of the assignment, in order to perfect the title of the assignee."

There is another factor of assignments to be considered. It is true that the courts in many of the states at the present day will decline to examine into the consideration of the assignment of an ordinary contract, holding that a payment of it by the debtor to the person who holds the rights under a valid assignment will release the debtor from his liability.[33] But it was probably the common-law rule, and certainly the equity rule, that an assignment would not be supported unless consideration had been given by the assignee.[34]

[31] Van Keuren v. Corkins, 66 N. Y. 77.

[32] Stocks v. Dobson, 4 De Gex, M. & G. 15.

[33] Sheridan v. Mayor, etc., 68 N. Y. 30; Burtnett v. Gwynne, 2 Abb. Prac. 79; Stone v. Frost, 61 N. Y. 614; Allen v. Brown, 44 N. Y. 228; Durgin v. Ireland, 14 N. Y. 322.

[34] Anson, Cont. p. 222.

Negotiability.

The rules in regard to negotiability are in sharp contrast to these principles governing assignments. With instruments made payable in blank or to bearer the debtor is prima facie protected in payments upon negotiable bills and notes made to the person who has the instrument in his possession.[35] The person having the instrument in his possession is, under such circumstances, presumed to own it, and to have a legal right to it.[36] A purchaser in good faith from one who has stolen them acquires a valid title.[37] If these were not the rules every bank or merchant who took the instrument, and gave money or value for it, would be compelled to make inquiries, and also give notice of their ownership of the instrument to all prior parties, to prevent the instrument's being paid to some one else. Several results would inevitably flow from these conditions. Business men would decline to take such trouble. This friction would check the circulation of the bill or note, and destroy its effectiveness as a quasi money. And thus, so far as negotiable bills and notes could aid it, credit would no longer be as good as cash in the commercial markets of the world.

Equities between Prior Parties.

The last and perhaps most important distinction made between the transfers of non-negotiable contracts and those of negotiable bills and notes is that in case of the former the assignee takes subject to the equities or defenses existing between the prior parties, while the bona fide holder of a negotiable instrument may disregard these equities, and recover upon suit the full amount called for by the instrument he buys. According to the Honorable Theodore Dwight,[38] the assignee of a non-negotiable contract takes subject, not only to the equities existing between the original parties, but also must al-

[35] Pettee v. Prout, 3 Gray, 502; Way v. Richardson, Id. 412; Garvin v. Wiswell, 83 Ill. 215; Jewett v. Cook, 81 Ill. 260; Collins v. Gilbert, 94 U. S. 753; Rubey v. Culbertson, 35 Iowa, 264; Ecton v. Halan, 20 Kan. 452; Wells v. Schoonover, 9 Heisk. 806.

[36] Wilson Sewing-Mach. Co. v. Spears, 50 Mich. 534, 15 N. W. 894; Bank v. Sollenberger, 1 Lancast. Law Rev. 75.

[37] Spooner v. Holmes, 102 Mass. 503; Birdsall v. Russell, 29 N. Y. 220; Evertson v. National Bank of Newport, 66 N. Y. 14. See, also, cases post, p. 240.

[38] Trustees of Union College v. Wheeler, 61 N. Y. 88.

ways abide the case of the person from whom he buys. The holder of a chose in action cannot alienate anything but the beneficial interest he possesses.[39] It is a question of power or capacity to transfer to another, and that capacity is to be exactly measured by his own rights. This is undoubtedly the law in England and in New York, though in many of the states of the Union the great authority of Chief Justice Kent has prevailed to limit the equities to those existing between the original parties, and does not extend them to those existing in favor of third parties. The technical or theoretical reason of the rule is that given by Judge Story.[40] "Every assignment of a chose in action is considered in equity as in its nature amounting to a declaration of trust and to an agreement to permit the assignee to make use of the name of the assignor in order to recover the debt, or to reduce the property into possession." This theory leads to the conclusion that the action by the assignee must be precisely commensurate with that of the assignor, as it must be in his name, and on the supposition that, for the purposes of the action, he is still the owner.

INDICIA OF NEGOTIABILITY.

8. The instrument must contain express words of negotiability, although there is no set form of such expression. It is enough if the intention of the parties to make it negotiable can be fairly construed from the terms of the contract.

9. The usual form of making an instrument negotiable is making it payable either

(a) To order, or

(b) To bearer.[41]

[39] Warner v. Whittaker, 6 Mich. 133; Seligman v. Ten Eyck's Estate, 49 Mich. 104, 13 N. W. 377; Shotwell v. Webb, 23 Miss. 375; Howell v. Medler, 41 Mich. 641, 2 N. W. 911; Ayres v. Campbell, 9 Iowa, 213; Timms v. Shannon, 19 Md. 296; State Mut. Fire Ins. Co. v. Roberts, 31 Pa. St. 438; Cary v. Bancroft, 14 Pick. 315; Harwood v. Jones, 10 Gill. & J. 404; Scott v. Schreeve, 12 Wheat. 605.

[40] Story, Eq. Jur. § 1040.

[41] McMullen v. Rafferty, 89 N. Y. 456; Cromwell v. Hewitt, 40 N. Y. 491.

It is the purpose of this section to explain what form of words, when they occur in an order or promise to pay money, makes that order or promise a negotiable one; or, in other words, what indicia are those of negotiability. As has been said, negotiability is the peculiar theory of the law merchant, and the law merchant has as its sources the enactments of statutes and the decisions of judges, based upon the theories of equity and reason of commercial expediency.

The first question, then, is, what indicia are declared by the statutes to confer negotiability upon orders or promises to pay money? These indicia consist in the first place in certain words or phrases created by and appearing in the statute itself. The statute of Anne, for example, declares, in words, that "all notes whereby one doth promise to pay to any other person, his order, or unto bearer, shall be assignable or indorsable over as inland bills of exchange, according to the custom of merchants." [42]

In very many states these words of the statute of Anne, or words quite similar to them, have been re-enacted. In some states, in addition to the foregoing phrases, specified in the statute of Anne, peculiar phrases appear to be essential to negotiability: In Alabama (Code 1867, § 1833), notes must be payable at a banker's, or designated place of payment. Bills payable generally, see Oates v. Bank, 100 U. S. 239. In Arkansas (Laws 1869), the words "without defalcation" must be used. In Indiana (1 Rev. St. 1876, p. 636), notes must be payable at a bank. In Missouri, words of consideration are necessary to a note, but not to a bill. Gen. St. c. 86, § 15. In Virginia (Code 1783, c. 141, §§ 1, 7), the place of payment is necessary on a note, but not on a bill. And to determine whether instruments contain the quality of negotiability, we may first turn to the statute of the state, and, if there appear upon the face of the instruments the phrases authorized by the statute, then, other things being equal, the notes are certainly negotiable. And, as appears hereafter, except in the case of a restrictive indorsement, an instrument once stamped by the original parties with the character of negotiability in most cases cannot be deprived of this characteristic, but remains so despite the subsequent agreement or conduct of the parties transferring it.

[42] Goodwin v. Robarts, L. R. 10 Exch. 337, Johns. Cas. Bills & N. 3.

While it is unquestioned that bills and notes, correct in other respects, drawn in the words of the statutes, are negotiable, those words are not the only forms of words which will confer negotiability. Some express words are, however, necessary to confer this quality. A note in words,[43] "8 months after date, we promise to pay G. H. $275, for value received," was held not a negotiable note, because the statute directed words of negotiability. But the true reason is that laid down by Lord Holt,[44] given in a case where the words "or his order" were omitted from a bill. "And the chief justice did agree that the indorsement of this bill did not make him that drew the bill chargeable to the indorsee, for the words 'or his order' did give authority to assign it by indorsement, and it is an agreement by the first drawer that he would answer it to the assignee."

What words will then be deemed by the courts to confer negotiability? "Whether the parties to an instrument can give it a negotiable character, with all the incidents pertaining to negotiable paper, when it is not in terms within the class of instruments known to the law as 'negotiable,' may be questioned," says Allen, J., in Evertson v. Bank.[45] But, however this may be with instruments intended to be otherwise than orders or promises for the payment of money alone, still it is probably the rule that, in the instruments governed by the rules of the law merchant, any words in a bill or note whence it can be inferred that the person making it intended it to be nego-

[43] Maule v. Crawford, 14 Hun, 193. See, also, Robinson v. Brown, 4 Blackf. 128; Fernon v. Farmer, 1 Har. (Del.) 32; Yingling v. Kohlhass, 18 Md. 148; Barriere v. Nairac, 2 Dall. 249; Whitwell v. Winslow, 134 Mass. 343; American Exch. Bank v. Blanchard, 7 Allen, 333; Fawsett v. National Life Ins. Co., 97 Ill. 11; Lowy v. Andreas, 20 Ill. App. 521.

[44] Hill v. Lewis, 1 Salk. 132.

[45] Evertson v. National Bank of Newport, 66 N. Y. 18. See, also, Crouch v. Credit Foncier of England, L. R. 8 Q. B. 374. In the case of Miller v. Biddle, which was an action on a promissory note, it was held that the omission of the words "or order," or "or bearer," made no difference as to the negotiability of the note. Miller v. Biddle, 13 Law T. (N. S.) 334; Hasey v. White Pigeon Beet-Sugar Co., 1 Doug. (Mich.) 193; Robinson v. Wilkinson, 38 Mich. 299; Almy v. Winslow, 126 Mass. 342; Grinnell v. Baxter, 17 Pick. (Mass.) 386; Daggett v. Daggett, 124 Mass. 149; Judson v. Gookwin, 37 Ill. 286.

tiable, will give it a transferable quality against that person.[46] This is probably the better rule, although it was the former English rule that, unless a bill or note be payable to order or to bearer, it was not negotiable. The intent of the parties should, and probably would, override the form of words, and if the court can determine from the words used that, as a matter of fact, it was the intention of both of the parties, the one to assume the rights of a holder of a negotiable instrument, and the other to incur the liabilities of a party thereto, and the instrument in other essential respects contains the elements of a negotiable bill or note, the instrument would probably be treated as negotiable although formally incorrect.

PURPOSE OF NEGOTIABILITY.

10. Negotiable bills and notes in some respects play the part of money in business affairs. They are used to transfer property or rights by means of individual or corporate credits. The fundamental purpose of negotiability is to endow them with all facilities necessary for a limited commercial medium.[47]

The business aim of negotiable bills and notes is to furnish for public use a sort of money.[48] The way in which this aim is realized by the courts is by their formulating and establishing the some-

[46] U. S. v. White, 2 Hill, 59; Gibson v. Minet, 1 H. Bl. 569; Mechanics' Bank v. Straiton, 3 Abb. Dec. 269.

[47] Illustration of the use of a negotiable instrument as a circulating medium: If A and B are in England, and C in Jamaica be indebted to A £1,000, and B be going to Jamaica, he may pay A this £1,000 and take a bill of exchange drawn by A in England upon C in Jamaica. B, on his way to Jamaica, may be paid the £1,000 for the bill by D in New York, and indorse it to him; D may be paid for the bill £1,000 by E in Charleston, and indorse it to him; and E will collect the money of C, to whom it is presented for acceptance, in Jamaica, and who accepts it.

See Russell v. Whipple, 2 Cow. (N. Y.) 536; Durgin v. Bartol, 64 Me. 473; Goodwin v. Robarts, L. R. 10 Exch. 337, Johns. Cas. Bills & N. 3.

[48] Bills of exchange and promissory notes are representatives of money, circulating in the commercial world as such. Friedlander v. Texas & P. Ry. Co., 9 Sup. Ct. 570, 130 U. S. 416; Id., Johns. Cas. Bills & N. 11.

what artificial rules we shall hereafter discuss. These rules all point to one end,—the protection of the bona fide holder so far as that is consistent with justice to the other parties to the instrument. It is necessary, as we shall hereafter see, that the order or promise contained in a bill or note should be definite, so that the person receiving it in exchange for merchandise or other value may know that he is exchanging a right that is equivalent to value, for value itself; that it should be for money only, because, from a commercial as distinguished from a politico-economical standard, money is the only thing in business whose value does not fluctuate. And so, through the entire system, in laying down their rules, the courts have asked themselves these questions: Is the application of the rule just for all parties, and, all things being considered, the most expedient for commerce? And, second, is the rule such that a person taking the bill or note in exchange for something of value will be protected in the enforcement of the bill or note, as a legal right, if it is not paid? This idea once understood by the student, the scattered and seemingly irrelevant rules become consecutive parts of a consistent theory.

Probably the primary object of negotiability is to give to bills or notes the effect which money, in the shape of government bills or notes, plays in commercial transactions. These last are an unquestioned legal tender or medium of payment for debts, or for the transfer of property or rights. They are such an unquestioned medium because the credit or solvency of the government, which has caused them to be issued, is behind them. It is the distinct promise of a whole nation to exchange for the bill or note itself, in precious metal, a sum of money intrinsically worth its face. But there is a distinction between the bank or government bill and the negotiable bill or note. The former is value itself, and present payment, the latter, a direction or promise to pay in the future. The bank or government bill, because of the government credit behind it, is in business an instrument in itself of intrinsic value. The bill or note depends for its value upon the credit of the parties to it.

A man's credit is rated at the amount of property or valuable rights he can procure. He makes this credit available in his bill or note because his credit is its guaranty of future payment. The elements of credit may be either his earning capacity or the accumu-

lated property he owns. Business men rely upon these as the source of probable future payment. And so merchants sell goods to people, and banks discount their notes and drafts. And business men who thus have no property in cash are by means of credit enabled to conduct and carry to completion business and commercial enterprises. Other business men will take these promises of men of undoubted credit, and treat them as cash. And thus we see bills and notes going from hand to hand in the commercial markets, and credit taking the part of money in commercial transactions. And here, perhaps, as a part of this theory of negotiability, it is well to show how far and under what circumstances courts have treated negotiable instruments as liquidation of indebtedness.

PAYMENT BY NEGOTIABLE INSTRUMENT.

11. The common rules regarding a negotiable instrument as a medium of payment are as follows:

(a) In most jurisdictions a negotiable instrument given by one person to another for a debt does not discharge it unless such be the agreement of the parties; suit may be brought upon the maturity of the note either upon the original consideration or upon the instrument itself.

(b) A negotiable instrument, made by a third person, and given without indorsement for a cotemporaneous debt, is deemed to have been given in payment and satisfaction unless the contrary be expressly proved; and in such case the onus is upon the person receiving the paper.

(c) A negotiable instrument made by a third person and indorsed in consideration of a cotemporaneous debt, or given without indorsement for a precedent debt, is not deemed to have been taken in payment, and the onus of proving such fact is upon the debtor.

The foregoing rules formulate the principal methods by which negotiable instruments operate as a quasi money. The student,

at a glance, will see that they are not as effective as government bills are. Government bills have a present value. They are legal tender for the payment of debts. Once being offered to him in payment of an indebtedness, a creditor cannot procure any further remedy in the courts, but himself must pay the costs of litigation, if he seeks one. Ordinary negotiable instruments are different from government paper, in that they are mere choses in action. They have a prospective, and not a present, value. No man can be compelled to take them for the payment of a debt unless he chooses to do so. And once being taken in payment of debt, it is at best only a substitution of one right of action for another. If when the instrument becomes due, the parties obligated refuse payment of it, the creditor must go into court and sue upon the instrument itself. And the points for the student to examine are, whether the instrument taken on account of a debt discharges the debt, and merges the debt in the instrument received by the creditor, so that he can have recourse to that alone, or whether it is simply a collateral security and suspends the collection of the debt during its currency. Upon these questions indebtedness is classified as of two kinds. The first is, the pre-existing or antecedent indebtedness; the second, the debt created at the time the instrument is delivered. Of course in every case, if it is agreed between the creditor and debtor that the instrument be taken in payment of a debt, then it is immaterial whether the indebtedness be antecedent or cotemporaneous; whether the instrument be that of the parties or of a third person, transferred with or without indorsement. In all cases it is payment, and the original indebtedness is merged because the creditor and debtor have expressly agreed it should be so. The contract right thus created supersedes all else in the transaction. But where nothing is said between creditor and debtor, and the creditor has as much right to say that it was either a suspension of payment, or even no suspension at all, as the debtor has to say it was a merger of the indebtedness, it is left for the courts to put a construction upon the transaction.

A negotiable instrument is an executory contract. It is a mere order or promise of future payment. Where it is given for a pre-existing debt the law has already implied a promise of payment. The debtor therefore was already the debtor on a promise, and in giv-

ing the creditor the instrument makes him another promise. In this transaction there is nothing over and above the original debt. The order or promise in such an instrument is a security of no higher degree than the implied promise. There was thus no consideration for the new instrument. It is merely a new promise to do a thing which the debtor was bound to do before, and he cannot refuse in law to perform the old promise, because he has promised it again and again. And the creditor may surrender or cancel the instrument at the trial, and proceed upon the original indebtedness, because each subsequent promise to perform it was a mere nudum pactum.[49] The courts have passed beyond the true meaning of this rule in saying that, because the instrument is a nudum pactum, therefore it is not even an extension of indebtedness. Their reasoning is, that a promise to extend time of payment, unless founded upon a good consideration, is void, because a promise by a debtor to pay a debt past due, at a future day, is not a consideration for the promise of the creditor to extend the time of payment. The debtor, in discharging his legal obligation to the creditor by repeating the promise which the law has already created for him, confers no benefit upon the creditor, nor does he himself suffer a detriment at the creditor's hands which the law calls a sufficient consideration for such an agreement.[50] And the courts, following the logic of this general rule to what seems an extreme, have established the principle that,

[49] Smith v. Chester, 1 Term R. 655; Bank of U. S. v. Daniel, 12 Pet. 32; Lewis v. Davisson, 29 Grat. 266; McLaren v. Hall, 26 Iowa, 298; Archibald v. Argall, 53 Ill. 307; Logan v. Attix, 7 Iowa, 77; Jones v. Shawhan, 4 Watts & S. 261; Lee v. Green, 83 Ala. 491, 3 South. 785; McGuire v. Bidwell, 64 Tex. 43; Henry v. Conley, 48 Ark. 271, 33 S. W. 181; Hopkins v. Detwiler, 25 W. Va. 748; Reeder v. Nay, 95 Ind. 164; Selby v. McCullough, 26 Mo. App. 67; Riverside Iron-Works v. Hall, 64 Mich. 168, 31 N. W. 152; Geib v. Reynolds, 35 Minn. 331, 28 N. W. 923; Merrick v. Boury, 4 Ohio St. 60; Cole v. Sackett, 1 Hill (N. Y.) 516.

(Memo.) It is to be observed that the courts of Massachusetts, Maine, Vermont, Indiana, and Louisiana have held that the taking of a bill or note on account of a precedent debt is presumed to be a satisfaction of subject to the right to introduce parol evidence to rebut this. O'Conner v. Hurley, 141 Mass. 149, 16 N. E. 764; Gooding v. Morgan, 37 Me. 419; Olvey v. Jackson, 106 Ind. 286, 4 N. E. 149.

[50] Reynolds v. Ward, 5 Wend. 502; Parmelee v. Thompson, 45 N. Y. 58; Gibson v. Renne, 19 Wend. 389; Kellogg v. Olmsted, 25 N. Y. 189.

where there is no express agreement for an extension, the acceptance of bills or notes in and of themselves is not such an extension of indebtedness, that the creditor may not surrender the notes before they are due, and proceed upon the original indebtedness.[51] In contrast to the rule thus established, the rule more consistent with business sense would seem to be that the acceptance of such a bill or note would be an extension of indebtedness. In its legal aspect, the bill or note is an express agreement, because its acceptance certainly evidences an intention of the creditor to allow a postponement of the debt. It may surely be considered a detriment to the debtor to waive all defenses he may have by subjecting himself to the liability of transfer of the instrument into the hands of a bona fide holder, who might collect it in any event when due. And the cases contrary to the foregoing rule, while they do not preponderate, still, where the law is unsettled, are entitled to weight and consideration.[52]

The other aspect of bills and notes, treated as a medium of payment, is where the paper of some third person is given for an indebtedness. In the absence of any express agreement, where the debt was created at the time of transfer, the parties are presumed to have intended payment to have been made in cash. And where this supposed intention is modified by the acceptance of a negotiable instrument of a third person in lieu of cash, then the courts interpret the transaction as meant by the parties to have the same end. Cash would have been payment, and the instrument of the third person was manifestly in lieu of cash, and therefore it also is payment.[53] Such was the view of the courts in the early development of law. "If a man has a bill payable to him or bearer, and he delivers it over for money received, without indorsement, this is a plain sale of the bill; and he who sells it does not become

[51] Warren v. Hodge, 121 Mass. 106; Graham v. Negus, 55 Hun, 440, 8 N. Y. Supp. 679; Moore v. Fitz, 59 N. H. 572; Gordon v. Price, 10 Ired. 385; McNeil v. McCamley, 6 Tex. 163; Marshall v. Marshall, 42 Ala. 149; Guion v. Doherty, 43 Miss. 538; Welch v. Allington, 23 Cal. 322; Breitung v. Lindauer, 37 Mich. 217; Poole v. Rice, 9 W. Va. 73; Walsh v. Lennon, 98 Ill. 27.

[52] Daniels, Neg. Inst. (4th Ed.) § 1272, and cases cited in the footnote.

[53] Whitbeck v. Van Ness, 11 Johns. 409; Clark v. Mundal, 1 Salk. 124; 12 Mod. 203; Bank of England v. Newman, 1 Ld. Raym. 442.

a new security," was the declaration of Lord Holt.[54] And this was adopted and reiterated, and for a long time regarded as doctrine settled beyond dispute. In the event of the bill being dishonored, the person who took it could not recover the price of his goods from the buyer, for the bill was considered as a satisfaction.[55] But it was seen that this rule worked injustice. And the creditor was allowed, if he could, to come in and rebut the presumption with which he was burdened in his case, and to show that it was not in fact the intention of the parties that the instrument should be taken as payment.[56]

Where, however, a pre-existing debt is the consideration for the transfer, the reasons we have given for this rule do not obtain. There is no cause to suppose that the parties intended to take the instrument as cash, and therefore as payment, because the transaction under which the indebtedness was created was rather to be supposed one in which the creditor had agreed to extend credit, because he had, as a matter of fact, so extended it. Nothing being agreed upon, the only fact which the courts can lay hold of to construe, is the fact that the debt is existent. Hence the implication is that the contract was to give credit at the time the debt was originally created, and therefore the giving of the instrument of the third person was no modification of it. The presumption therefore is that such instrument was not given and received in payment so as to discharge the debtor from his debt, and to substitute some one else's liability in place of his own, but was taken merely as collateral security.[57] And the onus of establishing the fact that it was so taken in payment is upon the debtor.[58] The courts give a similar interpretation to the act of the debtor, if he indorses the instrument, either in consideration of

[54] Bank of England v. Newman, 1 Ld. Raym. 442.

[55] Emly v. Lye, 15 East, 12.

[56] Noel v. Murray, 13 N. Y. 167; Gibson v. Tobey, 46 N. Y. 637; Hall v. Stevens, 116 N. Y. 201, 22 N. E. 374.

[57] A creditor who receives a negotiable promissory note as further security for a pre-existing debt does not become a holder for value. Bay v. Coddington, 5 Johns. Ch. (N. Y.) 54; Dennis v. Piper, 21 Ill. App. 169; Gardner v. Gager, 1 Allen (Mass.) 502.

[58] Noel v. Murray, 13 N. Y. 167; Shelby v. Manderville, 6 Cranch, 253; Gallagher v. Roberts, 2 Wash. C. C. 191, Fed. Cas. No. 5,195; Newall v. Hus-

an antecedent or of a cotemporaneous debt. They argue that the natural inference of such an act is that the creditor must be supposed to know nothing of the solvency of the maker or acceptor, but that upon the debtor's indorsement the contract between the creditor and debtor was that the debtor would pay the note if some other person did not. An indorsement in law is but a new bill or note, and therefore, when the debtor gives the bill or note of a third person, and indorses it, he is, so far as payment is concerned, in exactly the same position as if he had given his own note. Therefore, the rules which apply upon the giving of his own note must be applied when he indorses the instrument of a third person.[59] These reasons are particularly applicable in the giving and receiving of new bills and notes in renewal of ones already due, which are not surrendered, but are retained by the holder. The former cannot be construed to be in extinguishment of the latter, because the renewal bills or notes are of no higher dignity in law than the ones already due, nor do they put the holder in a better position than he was before. In fact, they benefit the debtor, because they give him a further day of payment, and hence should not be turned to the prejudice of the creditor by depriving him of rights he might already have.[60]

sey, 18 Me. 249; McGinn v. Holmes, 2 Watts, 121; Dougal v. Cowles, 5 Day, 511; Slocumb v. Holmes, 1 How. (Miss.) 139; Case v. Hall, 5 Mo. 59.

[59] Monroe v. Hoff, 5 Denio, 360; Daniel, Neg. Inst. § 1265.

[60] Bishop v. Rowe, 3 Maule & S. 362; Cumber v. Wane, 1 Strange, 426; Woods v. Woods, 127 Mass. 141; East River Bank v. Butterworth, 45 Barb. 476.

CHAPTER II.

OF NEGOTIABLE BILLS AND NOTES, AND THEIR FORMAL AND ESSENTIAL REQUISITES.

12. Definition and Forms of Bills of Exchange.
13. Definition and Form of Note.
14. Essentials of Bill or Note.
15. Order Contained in Bill.
16. Promise Contained in Note.
17–22. Certainty as to the Terms of the Order or Promise.
23–26. Payment of Money Only.
27–31. Specification of Parties.
32–34. Capacity of Parties.
35–37. Delivery of Instruments.
38. Date.
39. Value Received.
40. Days of Grace.

DEFINITION AND FORMS OF BILLS OF EXCHANGE.

12. A bill of exchange is commonly defined as an unconditional written order upon one person by another for the payment of a sum of money at a specified time absolutely and at all events.[1]

Bills of exchange are classified as foreign bills and inland bills.

[1] 3 Kent, Comm. p. 74. This definition is taken from Bayley on Bills (page 1), and is adopted by Chancellor Kent. It is criticised by Judge Story, and apparently rejected by him (Story, Bills, §§ 2–4), but is generally followed and accepted as the usual definition of a bill of exchange (see Wood's Byles, Bills & N. p. 1, and footnote). The student is recommended, however, to fix in his mind rather the statement of the essential elements of bills as given in section 14, than the formulated definition.

The following is a common form of foreign bill of exchange in a set:

Buffalo, N. Y., U. S. A., June 15, 1891.

First. Exchange for London.

£500

Thirty days after sight of this First of Exchange (Second and Third Unpaid) pay to the order of JOHN SMITH Five Hundred Pounds Sterling, value received, and charge the same to account of THOMAS ROBINSON.

ACCEPTED. Baring Bros. & Co.

To Baring Bros. & Co.
London, Eng.

Buffalo, N. Y., U. S. A., June 15, 1891.

Second. Exchange for London.

£500

Thirty days after sight of this Second of Exchange (First and Third Unpaid) pay to the order of JOHN SMITH Five Hundred Pounds Sterling, value received, and charge the same to account of THOMAS ROBINSON.

To Baring Bros. & Co.,
London, Eng.

Buffalo, N. Y., U. S. A., June 15, 1891.

Third. Exchange for London.

£500

Thirty days after sight of this Third of Exchange (First and Second Unpaid) pay to the order of JOHN SMITH Five Hundred Pounds Sterling, value received, and charge the same to account of THOMAS ROBINSON.

To Baring Bros. & Co.,
London, Eng.

The following is a usual form of an inland bill:

$500.00. Buffalo, June 15, 1891.

Thirty days after sight pay to the order of JOHN SMITH Five Hundred Dollars, value received, and charge to account of THOMAS ROBINSON.

ACCEPTED. Baring Bros. & Co.

To Baring Bros. & Co.,
New York City.

The parties to the foregoing bill are technically termed: (a) The drawer, or the party who orders the payment of the money in the bill, e. g. Thomas Robinson. (b) The drawee, or the party to whom the order is directed, e. g. Baring Bros. (c.) The acceptor, or the drawee when he has assented to the order, and thus become the principal debtor on the bill, e. g. Baring Bros. (d) The payee, or

the party in whose favor the order is made, e. g. John Smith. These are the parties to the bill in its origin. There are also subsequent parties: (e) The holder, or the person having legal possession of the bill, who, when it is negotiable, may recover the amount of the same. This term includes payee, indorsee, or bearer. (f) The indorser, or one who directs the amount of the bill to be paid to a person in the indorsement named, or to his order or to bearer. (g) The indorsee, or one who makes title to the bill through the order specified in the last foregoing.

A bill of exchange is usually called among business men "a draft." Such a bill, when duly accepted, is called an "acceptance."

Under the English law, bills drawn or payable abroad, or, until quite recent times, drawn in England and payable in Scotland or Ireland, or vice versa, were foreign bills. Bills drawn and payable either in England or Wales were inland bills. In the United States the general rule is that a bill drawn in one state and payable in another is a foreign bill,[3] the idea being in the United States that the several states, retaining in themselves the power to make local business regulations and laws, are thus far separate and independent sovereignties, and to be so viewed in the decision of points involved in the law merchant. Aside from these local regulations, the principal difference in the United States between the foreign and inland bill is that to charge the drawer and indorsers the former on dishonor requires protest by a notary public, the latter does not.[4] In the case of international foreign bills, a further usage of long standing has existed, arising from the difficulty of communication in former times between different nations and the danger of loss in travel. It is to draw the bill in a set of three or four parts, each a counterpart of the other, except that in each part of the set was incorporated a condition that that particular bill should only be payable provided all the others remained

[3] Halliday v. McDougall, 20 Wend. 81, 22 Wend. 264; Commercial Bank v. Varnum, 49 N. Y. 269; Dickens v. Beal, 10 Pet. 572; Bank of U. S. v. Daniel, 12 Pet. 32; Phoenix Bank v. Hussey, 12 Pick. 483; Grimshaw v. Bender, 6 Mass. 157; Barclay v. Minchin, Id. 162.

[4] Union Bank v. Hyde, 6 Wheat. 572; Burke v. McKay, 2 How. 66; Young v. Bryan, 6 Wheat. 146. See collated cases, foot note to Wood's Byles, Bills & N. p. 261.

unpaid. This condition operates as a notice to the acceptor to accept and pay but one bill, and he and the drawer are liable upon but one bill; for it is well-settled law that a payment of one of a set operates as a discharge of the rest. The whole set collectively is deemed to amount to but one bill.[5] The rule that a payee or subsequent indorser, who indorses two or more parts of a bill to separate indorsees, is liable on indorsement to each separate indorsee, operates as a check to the improper circulation of the bill. The transferrer is bound to pass over upon transfer all parts of the bill in his possession, and thus the circulation of these instruments may be effected with safety.[6]

DEFINITION AND FORM OF NOTE.

13. A promissory note is commonly defined as an unconditional written promise, signed but not sealed by the maker, to pay absolutely and at all events a sum certain in money, either to the bearer or to a person therein designated or to his order.[6]

A common form of note is:

New York. $500.00. Buffalo, June 15, 1891.

Thirty days after date I promise to pay to the order of JOHN SMITH Five Hundred Dollars, value received, at Bank of Buffalo.

THOMAS ROBINSON.

The parties to the foregoing note are technically termed:

(a) MAKER—The person who signs the note and makes the promise; e. g. (Thomas Robinson.)

(b) PAYEE—The person in whose favor the promise contained in the note is made; e. g. (John Smith.)

Subsequent Parties to Bill or Note.

[5] 3 Kent, Comm. 109; Wells v. Whitehead, 15 Wend. 527; Durkin v. Cranston, 7 Johns. 442.

[6] Pinard v. Klockmann, 3 Best & S. 388, 32 Law J. Q. B. 82.

[6] Chalm. Bills & N. art. 271; Edw. Bills & N. § 134; Byles, Bills (Wood's Ed.) p. 41; Daniel, Neg. Inst. § 28. The student is here recommended to fix in his mind rather the statement of the essential elements of a note than the formulated definition.

The foregoing are parties to the note in its origin. There are also subsequent parties. They are:

(a) HOLDER—The person having legal possession of the instrument, who, when it is negotiable under the law merchant, may recover the amount of same. This term includes payee, indorsee, or bearer.

(b) INDORSER—One who directs the amount of the bill or note to be paid to a person in the indorsement named, or to his order, or to bearer.

(c) INDORSEE—One who makes title to the instrument through the order specified in the last foregoing.

ESSENTIALS OF BILL OR NOTE.

14. To be a negotiable bill of exchange or promissory note, the instrument must have the following essential characteristics:

(a) The bill must contain an order.

(b) The note must contain a promise.

(c) The order or promise must be unconditional.

(d) It must be an absolute promise for the payment of money alone.

(e) The amount of money and its time of payment must be certain.

(f) The instrument must be specific as to all its parties.

(g) The instrument must be delivered.

ORDER CONTAINED IN BILL.

15. An order means any form of words implying a right on the part of the drawer to demand payment of the money specified in the draft, and a corresponding duty to pay on the part of the person on whom demand is made.

Our purpose here is to illustrate the difference between a mandatory form of words directing some one to pay money which he owes, and which can be circulated as a negotiable instrument,

and a mere request for a loan, which can have no value in the commercial market. The distinction sought to be maintained is that between a direction or a command and a request. The theory is that the drawer has funds in the hands of the drawee, which he orders or directs to be delivered or paid over to the payee or indorsee of the bill.[7] Hence, where the instrument is so written as to show that the drawer has no right to order the money paid, it is not a bill of exchange.[8] To determine this is, of course, a question purely of the construction of the instrument. The point to be determined is whether the terms of the instrument, on the one hand, leave compliance or refusal optional, or, on the other hand, amount to an imperative direction. In the former case it is a mere request for a loan to be given some one else; in the latter it is a demand, with which the drawee must in common honesty comply, and amounts to the order which is a necessary constituent of a bill of exchange.

We may perhaps make this distinction more clear if we show it as it is laid down in the cases. Among the earliest ones on the point which illustrate the distinction are Ruff v. Webb[9] and Little v. Slackford.[10] In Little v. Slackford Lord Tenterden said: "The fair meaning of the words, 'Please to let the bearer have seven pounds, and place it to my account, and you will oblige your humble servant, R. Slackford,'—was: 'You will oblige me by doing it.'" In Ruff v. Webb the words were: "Mr. B will much oblige Mr. A by paying C or order." In this case the instrument was construed in the light of surrounding facts. For C was A's servant, and on his discharge received the instrument in question, directed to B, who was (so it was given in evidence) A's banker. It appeared also that A paid

[7] For a distinction between checks and bills of exchange see Morrison v. Bailey, 5 Ohio St. 13; Johns. Cas. Bills & N. 40. Certificates of deposit are, in legal effect, promissory notes. Tripp v. Curtenius, 36 Mich. 494; Johns. Cas. Bills & N. 38. As holding a bank pass book to be non-negotiable, see McCaskill v. Connecticut Sav. Bank, 60 Conn. 300, 22 Atl. 568; Id., Johns. Cas. Bills & N. 35. Bills of lading are quasi negotiable instruments, transferable by indorsement and delivery. Shaw v. Railroad Co., 101 U. S. 557; Johns. Cas. Bills & N. 42.

[8] Edw. Bills & N. § 187; Chit. Bills, p. 154; Luff v. Pope, 5 Hill, 413.

[9] Ruff v. Webb, 1 Esp. 129, (before Lord Kenyon in 1794.)

[10] Little v. Slackford, Moody & M. 171, (before Tenterden, C. J., in 1828.)

all his bills by giving instruments of this kind on B, which B paid when presented. C knew this. Lord Kenyon said it was a bill of exchange, because it was an order to pay money. In other words, in the latter case it was an order to pay money, because the payment of the instrument was obligatory upon B, who, in common honesty, was bound to pay it; in the former, it was a mere favor, because there was no duty resting upon the person to whom the instrument was addressed.[11] He owed the signer nothing. Nor does the fact that the order is expressed in polite words impair its obligatory form. They may seem a request, yet be in fact an order. Indeed, the presumption is against their being a request, and the courts generally seek to construe the instrument as an order.[12] And, in order to displace the construction that the instrument is a bill, it would seem to require that the language necessarily imported a favor, and was not meant as mere words of civility.[13]

On the other hand, as instances of instruments importing requests, we may refer to Hamilton v. Spottiswoode,[14] where the words were: "We authorize you to pay C or order." Here Baron Parke said: "Here is only an option to pay or not; therefore this document is only a warranty in case the defendant paid, and not a bill of exchange."[15] And in Russell v. Powell,[16] where J M assigned to the plaintiff a share in the estate of T H, deceased, in the following instrument: "To the executors of T H, deceased—Gents: We do hereby authorize and require you to pay to Mr. Geo. Powell, or his order, £250, being the amount directed by an order of court to be paid to our order. J M,"—it was pointed out that the exec-

[11] See, also, Ellison v. Collingridge, 9 C. B. 570.

In King v. Ellor, 1 Leach, 323, it was held that the terms of the following order did not import any compulsion on the part of the drawee to pay, but was simply a request. "Please to send £10 by the bearer, as I am so ill I cannot wait upon you." An account, with an order accompanying, from the creditor to the debtor that the latter should pay the account to the agents of the creditor, was held not to be a bill. Norris v. Solomon, 2 Moody & R. 266.

[12] Story, Bills & N. § 33; Wheatley v. Strobe, 12 Cal. 92; Spurgin v. McPheeters, 42 Ind. 527.

[13] Hoyt v. Lynch, 2 Sandf. 328.

[14] Hamilton v. Spottiswoode, 4 Exch. 200.

[15] King v. Ellor, 1 Leach, 323; Willoughby's Case, 2 East, P. C. 582, 936.

[16] 14 Mees. & W. 418.

utors need or need not pay this sum, according to the condition of the estate in their hands, and therefore this was not a bill of exchange.

The leaning of the courts is to treat words in an instrument requesting payment as mandatory, and the instrument itself as a bill;[17] but this is not a conclusive presumption. It is rather a prima facie one. The courts, where the instrument is ambiguous, will look at the relation which the drawer and acceptor maintained toward each other, the objects they had in view, as well as the scope and tenor of the instrument for the purpose of ascertaining their intention.[18] They will examine into the circumstances under which the instrument is given,[19] and the situation of the parties,[20] looking into all antecedent and surrounding facts to ascertain the meaning of the instrument itself;[21] and if it appears from all these things that it was the intention of the parties that the drawee should be primarily liable, and liable upon the instrument at all events, then the words, whatever they may be, will be construed as an order, and importing an obligation; otherwise they

[17] Ellison v. Collingridge, supra.

[18] Van Wagner v. Terrett, 27 Barb. 181, at page 186; Green v. Eldred, 66 N. Y. 611; Maxon v. Maxon, 16 N. Y. St. Rep. 74; Bridger v. Pierson, 45 N. Y. 601. In an action on an ambiguous instrument Bayley, J., said: "I think also that where a party frames his instrument in such a way that it is ambiguous, whether it be a bill of exchange or a promissory note, the party holding it is entitled to treat it as either one or the other, and that the plaintiff ought not to be defeated by the party who framed the instrument being allowed to say that it is a bill of exchange." Edis v. Bury, 6 Barn. & C. 433. To the same effect, see Lloyd v. Oliver, in which, in reference to the instrument in question, it is said that: "It is not unjust to presume that it was drawn in this form for the purpose of suing upon it, either as a promissory note or as a bill of exchange." 18 Q. B. 471. See, also, a similar opinion in Com. v. Butterick, 100 Mass. 12. In the case of Miller v. Thompson, it was held that, since the instrument sued on was without distinct parties as drawer and drawee, these being essentials of a bill of exchange, it should, as the only alternative, be declared on as a promissory note. 3 Man. & G. 576.

[19] De Lavallette v. Wendt, 75 N. Y. 579; Kenyon v. Knights Templar & Masonic Mut. Aid Ass'n, 122 N. Y. 247, 25 N. E. 299; White v. Hoyt, 73 N. Y. 505, at page 512.

[20] Field v. Munson, 47 N. Y. 221; Pitney v. Glens Falls Ins. Co., 65 N. Y., at pages 16–18; Patten v. Pancoast, 109 N. Y. 625, 15 N. E. 893.

[21] Blossom v. Griffin, 13 N. Y. 569.

operate at most only as an assignment to the payee, and the instrument is not a draft or bill of exchange.[23]

PROMISE CONTAINED IN NOTE.

16. A promise means any form of words from which an intent of the maker to pay can be construed.

A mere admission that a debt is due, which can be treated on a trial only as so much proof tending to establish a debt, is a very different thing from the promise required for a negotiable promissory note. A promissory note is a new obligation, and not simply evidence of an old obligation. An acknowledgment of indebtedness is evidence of an old obligation, but creates no new obligation.[24] In such terms as "Due C, $100, value received;" "I O U $100;"[24] "I acknowledge the within note to be just and due,"[25]—there is no liability that is new, assumed by the persons who signed these instruments. They are mere memoranda relating to a financial transaction, without any implication in words of a promise to pay.

The courts go to the extreme limit to support a note in finding a promise to pay. Thus, in the words, "I do acknowledge myself to be indebted to A in £50, to be paid on demand,"[26] the words "to be paid" were deemed a promise to pay; and the words, "I O U, to be paid on the 20th inst.," were held a promissory note for a similar reason.[27] So the words "John Mason, 14th Feb., 1836, borrowed of

[23] Duffield v. Johnston, 96 N. Y. 369.

[24] In the case of Hyne v. Dewdney, which was for money lent, it was held that time of payment should be mentioned in a note, and that an instrument lacking such mention of time was nothing more than an acknowledgment that the money had been paid. 21 Law J. Q. B. 278. To the same effect, see Taylor v. Steele, infra. By a very recent decision in New York the court of appeals has repudiated this doctrine, and held that an acknowledgment of indebtedness implies a promise to pay. Hegeman v. Moon, 131 N. Y. 462, 30 N. E. 487.

[24] Currier v. Lockwood, 40 Conn. 349.

[25] Gray v. Bowden, 23 Pick. 282.

[26] Casborne v. Dutton, Selw. N. P. 329.

[27] Brooks v. Elkins, 2 Mees. & W. 74. This case was held not to be one of an ordinary I O U, which is a bare admission of debt, but, since it contains

Mary, his sister, the sum of £14 in cash, as per loan, in promise of payment of which I am truly thankful for," were held to constitute a promise,[28] because they expressly stated an advance of a loan of money, which the court thought was impliedly undertaken to be paid for. The expressions of gratitude were in this case treated as mere redundancy. In the expression: "Good to C or order," [29] the words of negotiability amounted to a promise to be good not only to C, but also to whom he might direct; hence a general promise. So, also, the expression, "Due A, on demand," because the words "on demand" can only be of meaning with the words "to be paid" inserted.[30] In Arkansas and Illinois there are, it is true, decisions holding that the word "due" imports such a promise; [31] and in some jurisdictions other than these a duebill is also treated as a promissory note. But this is against the weight of authority, and doubtful law. The true question before the court in construction should be the intention of the signer, to be gathered from any form of words in the instrument itself, to assume and pay as a distinctly new obligation.[32]

an express promise to pay on a day certain, it is a promissory note. See, also, Morris v. Lee, 1 Strange, 629.

[28] Ellis v. Mason, 7 Dowl. 598.

[29] Franklin v. March, 6 N. H. 364.

[30] Smith v. Allen, 5 Day, 337. In this case, which was an action of assumpsit on the following instrument: "Due John Allen 94 dollars, 91 cents, on demand,"—it was held that the words "on demand," following an acknowledgment of debt, and signed by the debtor, import such a promise to pay as to constitute the writing a note. See Russell v. Whipple, 2 Cow. 536.

[31] Jacquin v. Warren, 40 Ill. 459; Anderson v. Pearce, 36 Ark. 293; St. Louis, I. & M. S. Ry. Co. v. Camden Bank, 47 Ark. 545, 1 S. W. 704; Brady v. Chandler, 31 Mo. 28; Lee v. Balcom, 9 Colo. 216, 11 Pac. 74.

[32] In the case of Block v. Bell it was held by Lord Lyndhurst that an instrument in this language: "On demand, I promise to pay A. B. or bearer, the sum of £15, for value received,"—constituted a promissory note. 1 Moody & R. 149. In the case of Taylor v. Steele an action was brought on the following instrument: "Received from Mrs. Barbara Taylor the sum of £170, for value received, for which I promise to pay at the rate of £5 per cent. from the above date." The following opinion was delivered by the court: "This document is not a promissory note, because it contains no promise to pay the principal, but only the interest. * * * I agree that an actual promise is not necessary if there are words in the instrument from which a promise to pay can be collected." 16 Mees. & W. (1847) 665. To the same effect,

A consideration of the decisions from which the foregoing instances are taken will clearly outline the theory that I O U's or acknowledgments of indebtedness cannot be made the foundations of commercial instruments. They can only be classified in law as admissions, and have weight as evidence.[88] In order to entitle the instrument to be ranked as a negotiable note, it must be in itself a distinctly transferable contract right or a promise to pay. The admission of indebtednes could, even if construed to its utmost effect, be only treated as a right which was open to every defense or set-off, and from their very nature, evidences of indebtedness could not be negotiable.

CERTAINTY AS TO THE TERMS OF THE ORDER OR PROMISE.

17. A negotiable bill or note must not be payable upon a contingency, nor at an uncertain time,—but must be payable absolutely and at a time certain.

EXCEPTIONS—(a) The negotiable instrument is subject to the implied conditions of presentment, and notice of dishonor.

(b) If the event is certain to happen, but uncertain only in regard to time, or if it is expressed as being payable at a time certain to transpire, but

see Russell v. Whipple, 2 Cow. 536. In Forward v. Thompson it is held that a bill must have a drawee, and that, to constitute a note, the instrument must have a promise in terms by the maker. 12 U. C. Q. B. 103. A certificate of deposit payable to order after a certain time, with interest, has been held to be a negotiable promissory note. Bank of Orleans v. Merrill, 2 Hill, 295. In an action of assumpsit on the following instrument: "Due A. & B. $17.14. Value received. X. Y.,"—the doctrine laid down in Smith v. Allen, supra, was followed, and it was held that the words "value received," were not equivalent to "on demand," and that, to constitute an instrument a promissory note, there must be an express promise distinct from an implied. Currier v. Lockwood, 40 Conn. 349.

[88] According to some courts, the effect of such phrase is simply to evidence a debt, and not to constitute a promissory note or receipt. Fisher v. Leslie, 1 Esp. 426.

is said to be payable on or before that time,[34] or is expressed to be payable in effect in a reasonable time, the instrument is negotiable.

18. The instrument must not be payable out of any particular fund.

DISTINCTION—Indicating to a drawee a source or fund where he may be reimbursed is not charging payment upon a particular fund.

19. A negotiable instrument may contain an additional condition or agreement, which is not of the essence of the order or promise, but rather an incident or addition to it.

20. A negotiable instrument may give the holder an option between payment of money and some other thing.

21. The following are absolute promises to pay money, and are negotiable instruments:

Instruments payable

(a) On demand, or

(b) At sight, or on a fixed period after sight or one in which no time is expressed, which is equivalent to an instrument payable on demand.

22. An instrument payable in installments, even though it provides that upon non-payment of an installment the whole becomes due, is a negotiable instrument.

Certainty in General.

Our purpose here is to explain why a negotiable instrument cannot be conditional in its terms, and why it must be absolute upon its face, and founded upon the entire credit of the parties.[35]

[34] A promissory note payable "on or before" a day named is certain as to time, and is negotiable. Mattison v. Marks, 31 Mich. 421; Johns. Cas. Bills & N. 22.

[35] It is a necessary quality of negotiable paper that it should be simple, certain, unconditional, and not subject to any contingencies. Citizens' Nat. Bank v. Piollet, 126 Pa. St. 194, 17 Atl. 603; Johns. Cas. Bills & N. 18. To the same effect see Smith v. Boheme, Gilb. Ch. 93. In the case of Josselyn v. Lacier, which was an action upon a bill or written request to pay "out of the growing substance" of the drawer, it was held that such instrument

Generally speaking, certainty is one of the first essentials to a circulating medium. If conditions written upon the face of negotiable instruments were to be permitted, then every holder who discounted them would necessarily be charged with notice of the facts on the face of the instrument. And to be in a position to assert his equities, every holder would further be bound to show that he had used all diligence to ascertain whether the condition had been fulfilled, or the event had happened. This would as much necessitate every holder procuring a written estoppel on transfer, as it does necessitate it when a person buys a mortgage. And, the very essence of business paper being the short terms of credit, to allow such an ingredient in the theory of negotiability would be an absurdity.

In the leading case of Gibson v. Minet,[86] the theory is explained thus: "The title of a bearer is self-evident. The title of an indorsee appears by the indorsement itself. Everything which is necessary to be known in order that it may be seen whether a writing is a bill of exchange, and as such, by the custom of merchants, partakes of the nature of a specialty, and creates a debt or duty by its own proper force, appears at once by inspection of the writing. The wit of man cannot devise anything better calculated for circulation. The value of the writing, the assignable quality of it, the particular

was not a promissory note, since it was not negotiable, by reason of its being payable upon a contingency "out of the growing substance." 10 Mod. 294, 316. A note payable to A. or order "on demand, on the return of this certificate, and my guarantee of his note to his brother," was held not to be good, as its payment depended upon the happening of a contingency. Smilie v. Stevens, 39 Vt. 315. In Alexander v. Thomas an order to pay "90 days after sight, or when realized," etc. (meaning when in funds for the purpose), was held to be dependent on a contingency which might never happen, and therefore not a good bill. 16 Q. B. 333. A promise to pay "in 1½ yrs. or sooner, at the option of the mortgagor, * * * with interest to be paid during said term and for such further time as said principal sum or any part thereof shall remain unpaid," was held not to be a good note, by reason of its not being a promise to pay a fixed sum of money at a definite time. Stults v. Silva, 119 Mass. 137. See, also, Way v. Smith, 111 Mass. 523; Sloan v. McCarty, 134 Mass. 245; Baird v. Underwood, 74 Ill. 176; Meyers v. Phillips, 72 Ill. 460; Smentek v. Coonhauser, 17 Ill. App. 266; Fleury v. Tufts, 25 Ill. App. 101.

[86] 1 H. Bl. 618.

mode of assigning it, are created and determined in the original frame and constitution of the instrument itself; and the party to whom the bill of exchange is tendered has only to read it, need look no further, and has nothing to do with any private history that may belong to it. The policy which instituted this simple instrument demands that the simplicity of it should be protected, and that it should never be entangled in the infinitely complicated transactions of particular individuals into whose hands it may come."

Illustration of Uncertainty as to Event.

Some of the instances of this rule, commonly cited, and important to mention because of the distinction which is drawn with regard to them, are that class of orders and promises where it is uncertain from the inspection of the instrument that the day or event of payment is ever to arrive. The case of Beardesley v. Baldwin [87] is an example. That was a promise to pay money "so many days after the defendant should marry." This is briefly reported as not being negotiable within the statute. Another instance is Braham v. Bubb,[88] which was a promise to pay "four years after date, if I am then living." Abbott, C. J., said: "It is contingent whether the note will ever be payable, for, if the maker should die within the four years, no payment is to be made." [89] These will perhaps suffice to illustrate the point that such instruments contain a promise so indefinite that, for business purposes, it hardly amounts to a promise at all.[40] It can certainly have no definite value. Hence the rea-

[87] 2 Strange, 1151.

[88] MS. Trin. Term, 1826, Middlesex (cited in Chitty, Bills, *135, note).

[89] Richardson v. Martyr, 25 Law T. 64; De Wald's Estate, 13 Phila. (Pa.) 251.

[40] In Richardson v. Martyr it was held that where demand on a note must be made during the lifetime of the payee, the undertaking was conditional, and did not, therefore, constitute a promissory note. 25 Law T. 64. Where a note was given on a condition that, should a dispute arise between certain parties about the subject for which the note was given, said note should be void, it was held that the instrument was not negotiable, since the party taking was compelled to inquire as to an extrinsic fact, and therefore took only a contingent benefit. Hartley v. Wilkinson, 4 Maule & S. 25. Where a written promise was given to pay for goods ordered and to be supplied subsequently, it was held that, since its consideration was not executed, such promise was not a promissory note, but merely a guaranty.

son of the rule that such instruments are non-negotiable, because uncertain. It would be unwise, from a business point of view, to allow such conditions to be incorporated in instruments for which the courts proposed to formulate rules as a circulating medium.[41]

Certainty as to Event, Uncertainty as to Time.

The rule laid down by the courts that no order or promise from the terms of which it was manifestly uncertain that the money will ever be paid can be a negotiable instrument, was undoubtedly wise. As much cannot be said for the rule laid down in contradistinction to it, in another aspect of this same point. Where the time

Jarvis v. Wilkins, 7 Mees. & W. 410. In an action on a note given "in consideration of foregoing and forbearing an action at law * * * for damages ascertained * * *," it was held that, as something had been done for which damages had been ascertained, and as there was an executed consideration, the note was payable, being a distinct promise. Shenton v. James, 5 Q. B. 199. A written promise to pay a certain amount of money as soon as K. shall come of age was held not to constitute a promissory note, and this, too, regardless of the fact that K. did in fact attain his majority. Kelley v. Hemmingway, 13 Ill. 604. In an action upon an order payable if terms mentioned in letters of the drawer should be complied with, it was held that there could be no recovery, although by the acceptance a compliance was admitted. The writing was not a bill when drawn, by reason of the contingency, and could not subsequently become so. Kingston v. Long, 4 Doug. 9, Bayley, Bills (6th Ed.) 16. In Appleby v. Biddolph—an action on a note in these words: "I promise to pay * * * if my brother doth not pay it within such a time"—judgment was arrested after verdict on the ground that the drawer might be the debtor only upon a contingency. Cited in 8 Mod. 363. A stipulation to pay attorney's fees in case of a suit upon a negotiable instrument does not destroy its negotiability. Dorsey v. Wolff, 142 Ill. 589, 32 N. E. 495; Id., Johns. Cas. Bills & N. 23; Brooks v. Hargreaves, 21 Mich. 254; Fralick v. Norton, 2 Mich. 130; First Nat. Bank of Port Huron v. Carson, 60 Mich. 432, 27 N. W. 589; Citizens' Nat. Bank v. Piollet (Pa. Sup.) 17 Atl. 603; Goodwin v. Goodwin, 65 Ill. 497; Gillilan v. Myers, 31 Ill. 525; Kingsbury v. Wall, 68 Ill. 311; Miller v. Excelsior Stone Co., 1 Ill. App. 273; Hubbard v. Moseley, 11 Gray, (Mass.) 170; Costelo v. Crowell, 127 Mass. 293.

[41] Corbett v. State, 24 Ga. 287; Husband v. Epling, 81 Ill. 172; Pearson v. Garrett, 4 Mod. 242; Palmer v. Pratt, 2 Bing. 185; Coolidge v. Ruggles, 15 Mass. 387; De Forest v. Frary, 6 Cow. 151; Grant v. Wood, 12 Gray, 220; Sloan v. McCarty, 134 Mass. 245; Brooks v. Hargreaves, 21 Mich. 255.

of payment was certain to arrive the courts considered the element of uncertainty which destroyed negotiability, eliminated, and the instrument was treated as an unconditional promise for the payment of money.[42] This rule originated in two cases, followed in other jurisdictions, but probably overruled in England, the jurisdiction of their origin. These cases are Andrews v. Franklin [43] and Colehan v. Cooke.[44] The instrument in Andrews v. Franklin was a promise to pay within two months after a certain public ship was paid off, and was held to be negotiable because the paying off a public ship is a thing of a public nature, and certain to arrive. In Colehan v. Cooke the instrument was a promise to pay ten days after the death of the maker's father,—an event also certain to arrive. In this last case Lord Chief Justice Willes said: "A note, to be within the statute of Anne, need be only an express promise to pay to another or to bearer, but as to payment the act is silent; that there was no limited time beyond which if bills of exchange were made payable they were not good; and that if a bill of exchange be made payable at never so distant a day, if it be a day that must come, it was no objection to the bill." This is probably the doctrine of the present day. Says Judge Pierpoint in Capron v. Capron: [45] "As long as the payment is certain, and the uncertainty is only as to the length of time to be given, this uncertainty the law makes certain by giving a reasonable time after the time prescribed to make payment." This decision was rendered upon a note in terms: "I promise to pay A B, or bearer, $75, one year from date, with interest annually; and, if there is not enough realized by good management in one year, to have more time to pay." So

[42] Walker v. Roberts, Car. & M. 590. But see Stewart v. Fullarton, Mor. Dict. 1408.

[43] 1 Strange, 24.

[44] Willes, 393. This was upon a note payable ten days after the death of the maker's father, which note was held good, as it was certain to fall due at some time.

[45] 44 Vt. 412. In the case of Smithers v. Junker, it was held that a note made payable at the convenience of the maker, in the following language: "For value received, I promise to pay to S. F. S. $2,048.25, payable at my convenience, upon this express condition: that I am to be the sole judge of such convenience and time of payment," is payable within a reasonable time. 41 Fed. 101; Johns. Cas. Bills & N. 21.

in Cota v. Buck,[46] a note to be paid "in the course of the season now coming" was negotiable because the date of payment must come by mere lapse of time.[47] Professor Ames makes a most apposite criticism of the foregoing rule. "Nothing," says he, "could be more inconsistent with the negotiability of a bill or note than that the holder should have to be continually on the alert to ascertain the precise day when they should become payable, in order to charge the drawer or indorser. It is impossible to attach a definite value to anything so speculative in its nature as an obligation payable so many days after the death of the maker." [48]

Payment out of Particular Fund.

There is another class of common business instruments which the courts have deemed obnoxious to the rules necessary to protect the theory of negotiability because they are not absolute orders or promises. They are those where a person, for value, has sought to transfer some particular property or right in an instrument which has much the form of a bill or note. They empower the payee to collect moneys of the drawer or maker which are coming from some particular source. They are not orders or promises to pay in any event. Thus in Jenney v. Herle [49] the court said: "It would be very mischievous if a tradesman applies to a gentleman for money for his bill. Says the gentleman, 'I will direct my steward to pay you,' and writes to him, 'Pay to J. S. the money mentioned in this bill out of the rents in your hands.' The steward has no rents in his hands. It can never be imagined the gentleman

[46] 7 Metc. (Mass.) 588.

[47] Works v. Hershey, 35 Iowa, 340; Goodloe v. Taylor, 3 Hawks, 458; Kiskadden v. Allen, 7 Colo. 206, 3 Pac. 221; Mattison v. Marks, 31 Mich. 421; First Nat. Bank v. Skeen, 29 Mo. App. 119; Ernst v. Steckman, 74 Pa. St. 13; Walker v. Woollen, 54 Ind. 164. In the case of Jordan v. Tate, it was held that "the negotiable character of a promissory note is not affected by the fact that it was made payable, by its terms, on or before a future day therein named." 19 Ohio St. 586.

[48] Alexander v. Thomas, 16 Q. B. 333; Stults v. Silva, 119 Mass. 137.

[49] 2 Ld. Raym. 1361, and see Dawkes v. Lord De Lorane, 3 Wils. 207, 2 W. Bl. 782; Carlos v. Fancourt, 5 Term R. 482; Griffin v. Weatherby, L. R. 3 Q. B. 753; Morton v. Naylor, 1 Hill, 583; Gallery v. Prindle, 14 Barb. 186; Wadlington v. Covert, 51 Miss. 631; Bayerque v. City of San Francisco, 1 McAll. 175, Fed. Cas. No. 1,137.

should be liable to be sued upon this as upon a bill of exchange." And the court accordingly refused to consider the instrument before them a bill of exchange, and considered it a "bare appointment to pay money out of a particular fund." The modern doctrine is the same. In Munger v. Shannon [50] the question was concerning this instrument: "Mr. Shannon: You will please pay to W. & H. the amount of $2,000, and deduct the same from my share of profits of our partnership." This was formally accepted. Dwight, C., said of this: [51] "A bill must be drawn on the general credit of the drawer, though it is no objection, when so drawn, that a particular fund is specified from which the drawee is reimbursed. The true test is whether the drawee is confined to the particular fund, or whether, though a particular fund is mentioned, the drawee may charge the bill up to the general account of the drawer if the designated fund turn out to be insufficient. It must appear that the bill of exchange is drawn on the general credit of the drawer.[52] It must carry with it the personal credit of the drawer, not confined to any fund. It is upon the credit of a person's hand as on the hand of the drawer, the indorser, or the person who negotiates it." Instances of the above principle are an order of A upon B to pay a certain sum in the words "on account of brick work done," [53] or "out of money in his hands belonging to me," [54] or when the paper was expressed as payable "for value received in stock ale brewing vessels," [55] or "out of the rents," [56] or "out of growing substance," [57] or "out of the net proceeds of certain ore," [58] or "out of a certain claim." [59]

[50] 61 N. Y. 251.

[51] 61 N. Y. 255.

[52] Dawkes v. Lord De Lorane, 3 Wils. 213; Josselyn v. Lacier, 10 Mod. 294.

[53] Pitman v. Breckenridge, 3 Grat. 127.

[54] Averett v. Booker, 15 Grat. 165.

[55] Clarke v. Percival, 2 Barn. & Adol. 660.

[56] 1 Pars. Bills & N. 43.

[57] Josselyn v. Lacier, supra.

[58] Thus it was held that a written promise to pay a certain amount at a time agreed upon, the means of payment to be derived from ores which were to be dug subsequent to the promise, did not comply with the requisites of a promissory note. There is in such an agreement a want of that certainty

[59] Brill v. Tuttle, 81 N. Y. 457; Ehrichs v. De Mill, 75 N. Y. 371, and list of authorities collated, 1 Ames, Bills & N., note p. 29.

Thus a negotiable instrument must be guarantied by the whole credit of the parties. It is to be their note of hand. It must be their promise to pay absolutely and at all events.[60] The instruments we have mentioned would be effectuated, but they would be effectuated as equitable assignments, and not as negotiable instruments. It would be the mere transfer of a single right, and not an instrument fitted to circulate as a medium based upon the entire credit of all the parties.

The mere fact, however, that a particular fund is referred to in an instrument does not make the instrument payable out of it. There is a wide difference between instruments drawn payable out of a particular fund and instruments that are chargeable to a particular account. The former, as has been said, is a mere equitable assignment pro tanto of the fund mentioned in it.[61] And the drawee, when he has had notice of the delivery of the assignment order to the payee, is bound to apply the fund, as it accrues, to the payment of the order, and to no other purpose. But if an order be made generally upon the drawee to be paid by him in the first instance on the credit of the drawer and without regard to the source from which the money used for its payment is obtained, the designation by the drawer of a particular fund out of which the drawee is to subsequently reimburse himself for such payment or a particular account to which it is to be charged will not convert the order into an assignment of the fund.[62] It must appear in the order, to have that effect. And it must contain either an express or implied direction to pay it therefrom, and not otherwise. In

of payment necessary in a negotiable instrument. Worden v. Dodge, 4 Denio (N. Y.) 159.

[60] In an action on a promise to pay, where there was certainty as to payer, payee, and amount and date, it was held that the words, "as per memorandum of agreement," did not, of themselves, make the promise conditional, but it was upon the defendant to prove that such was their effect. Jury v. Barker, El. Bl. & El. 459. In this connection, see, also, Lovell v. Hill, 6 Car. & P. 238, and Jarvis v. Wilkins, 7 Mees. & W. 410; Richardson v. Carpenter, 46 N. Y. 661.

[61] Lewis v. Berry, 64 Barb. 593; Parker v. City of Syracuse, 31 N. Y. 376; Alger v. Scott, 54 N. Y. 14; Risley v. Smith, 64 N. Y. 576; Ehrichs v. De Mill, 75 N. Y. 370; Brill v. Tuttle, 81 N. Y. 457.

[62] Brill v. Tuttle, 81 N. Y. 457.

the absence of express words, it is a question of construction whether the fund in question is referred to as a measure of liability or means of reimbursement.[63] Where the words themselves used are ambiguous, the rules we have already given apply.[64] Where there are no express words, then the fact that the ordinary language of a draft is used implies an intention to make the order negotiable. And this implication overrides the presumption that it was intended as an equitable assignment.[65] It is thought the duty of the drawer to plainly make the instrument limited upon a particular fund, if he intended it to be so. If he omitted to do this, in the absence of any words in the instrument, or where the words used are obscure, ambiguous, or uncertain, the courts start out with the assumption that the instrument was intended to be a negotiable one, and await proof to the contrary.[66]

Terms Collateral or Incidental to Order or Promise.

The reasons we have given control the courts where the instrument in form of an order or a promise to pay money is a promise to pay absolutely and at all events, but connected with it are other terms or contingencies which seem at first glance a part of the promise.[67] With these cases the instrument, instead of being a transfer of a particular property or right, remains a trans-

[63] Schmittler v. Simon, 101 N. Y. 554, 5 N. E. 452.

[64] See page 35, supra.

[65] Schmittler v. Simon, 101 N. Y. 554, 5 N. E. 452.

[66] An instrument in the following language: "Mr. I. B. C. & Co.: Please pay C. A. C. $100.90, and take the same out of our share of the grain,"—is a valid bill of exchange. Corbett v. Clark, 45 Wis. 403, Johns. Cas. Bills & N. 28. A request of the maker upon the drawee to pay to a certain person a certain amount of money "as my quarterly half pay, to be due from 24th of June to 27th of September next," was held to constitute a bill of exchange, since the pay was a certain fund, and in distinction to Jenney v. Herle, 2 Ld. Raym. 1361, where the writing was simply a private order to a servant, and also to Josselyn v. Lacier, 10 Mod. 294. See, also, Macleed v. Snee, 2 Strange, 762; Sproat v. Matthews, 1 Term R. 182; Redman v. Adams, 51 Me. 429; Spurgin v. McPheeters, 42 Ind. 527.

[67] Macleed v. Snee, 2 Strange, 762; Banner v. Johnston, L. R. 5 H. L. 157; Kelley v. Brooklyn, 4 Hill (N. Y.) 263; Griffin v. Weatherby, L. R. 3 Q. B. 753; Corbett v. Clark, 45 Wis. 403; Coursin v. Ledlie, 31 Pa. St. 506; Collins v. Bradbury, 64 Me. 37; Littlefield v. Hodge, 6 Mich. 326.

fer which is guarantied by the whole credit of the transferrer. The other terms of the instrument, as regards the main order or promise, are mere surplusage. The point to determine is whether the stipulation is a part of or necessary to the fulfillment of the promise or order. If it is not a promise to pay absolutely, it impairs the essential characteristic of certainty, and destroys the instrument's negotiability. The case commonly referred to as the leading authority is Wise v. Charlton.[68] This was a promise to pay £125, and contained the added words, "And I have deposited certain title deeds as collateral security." It was contended that the right to transfer the deeds was not negotiable, while the right to transfer the note was, but the court held that the memorandum of security was not imported into the main agreement, which was to pay money. Examples of this rule are memoranda upon the face of an instrument showing for what consideration it was given, as that it "is secured according to the condition of a certain mortgage," [69] or that "it was given in consideration of a patent right." [70] In New York the leading case is Leonard v. Mason.[71] There the draft was: "Levi Mason, Esq.: Please pay the above note, and hold it against me in our settlement." The court said the reference in the note was merely to ascertain the amount, and to hold it as a voucher in the coming settlement between the parties. Hodges v. Shuler [72] is also noteworthy. There the promise was "to pay $1,000, with interest, payable as per interest warrants; or, upon the surrender of this note, together with interest warrants, to the treasurer of the company, he [the treasurer] shall issue to the holder thereof ten shares of stock," etc. There were thus two courses open to the holder of the instrument, but not to the maker. His promise for the payment of a sum of money was unconditional. He might not pay in money or in stock, but the holder might, at his option, surrender the note and take the stock, thus in no wise compromising the right of any holder to collect the full amount of money called for by the instrument. The stipulation concerning

[68] 4 Adol. & E. 786.
[69] Hereth v. Meyer, 33 Ind. 511; Mott v. Havana Nat. Bank, 22 Hun, 351.
[70] Tassey v. Church, 4 Watts & S. 141.
[71] 1 Wend. 522.
[72] 22 N. Y. 114.

the stock was an incident to the note, not of the essence of the promise to pay money.[73]

Payment in Alternative.

This test determines also the negotiability of that large class of instruments payable in the alternative which are deemed by the courts absolute promises for the payment of money.[74] Such are options between payment of money and the delivery of some other thing.[75] The courts declare that "the instrument is no less an absolute promise for the payment of money because it vests the holder with the option to take payment in something else than money." The reason is that the maker or party on whose credit the instrument circulates is absolutely bound, and bound, moveover, to pay money alone. As long as this is the obligation of the promisor, it would be inexpedient to deny the instrument the immunities of negotiability, because of stipulations which are beneficial, and perhaps may add to its value. These stipulations vest in the promisee or person who discounts the bill or note the option whether he will enforce them or not. The maker, in every event, is bound absolutely to pay money.

Payment on Demand or at Sight.

For a like reason instruments payable on demand [76] or at sight are negotiable. The holder, at his option, may fix the liability of the maker. He may thus know exactly what to pay for them when he discounts them. They have a clear, definite value in the market, and are thus negotiable.[77] They were drawn at first with the evident purpose that merchants might for their own convenience fix the liability by presentment or demand, when the holder chose. This never was an indefinite time. Such a rule would have been a hardship to the drawer, maker, or parties already liable upon the instrument. But, said the courts, such presentation or demand

[73] Oatman v. Taylor, 29 N. Y. 649; Willoughby v. Comstock, 3 Hill, 389; Fairchild v. Railroad Co., 15 N. Y. 337.

[74] Kirk v. Dodge Co. M. Ins. Co., 39 Wis. 138; Heard v. Dubuque Co. Bank, 8 Neb. 16.

[75] Owen v. Barnum, 2 Gilman, 401; Preston v. Whitney, 23 Mich. 260; Dennett v. Goodwin, 32 Me. 44.

[76] Works v. Hershey, 35 Iowa, 340.

[77] Shenton v. James, 5 Q. B. 199.

must be made within a reasonable time,[78] meaning that the parties, their credit, their residence, and other circumstances of that character, being looked to, the matter of reasonableness might be left either to the court or the jury, or the court and jury, under certain fixed rules, and accordingly as the question of diligence was applied in different jurisdictions.[79] Certain of these rules were, however, very generally applied. In ordinary business situations, in the instance of a bill payable at so many days after sight, or payable at sight, a reasonable period, while it did not mean the very day when the bill was dated, or when it came to the hands of the holder, did not mean either that the bill should be treated as or be held for a single hour as a time instrument or obligation. And if no time was allowed for the convenience of the person on whom the bill was drawn, the words "on demand," or "at sight," or "after sight," were construed to mean that a presentation or demand must be made as soon as the holder could make it. And allowing for his convenience, if the parties reside in the same town, the presentation or demand must be made the next day after it came to the holder's hands, or longer, according to the distance of the parties from each other, and other circumstances which may reasonably prevent the prompt performance of the act. The term "demand," or "at

[78] Muilman v. D'Eguino, 2 H. Bl. 565; Robinson v. Ames, 20 Johns. 146; Wallace v. Agry, 4 Mason, 336, Fed. Cas. No. 17,096; Id., 5 Mason, 118, Fed. Cas. No. 17,097; Montelius v. Charles, 76 Ill. 303; Jordan v. Wheeler, 20 Tex. 698. In the case of Burkhalter v. Second Nat. Bank, the plaintiffs presented a draft by the defendant, upon the day it was received, and the drawee gave a check, taking the draft, and charging same to defendant. On the following day the check was dishonored upon presentation. The plaintiffs returned the check, and having recovered the draft, again presented it. Payment was refused, and it was protested. It was held by the court that: "The plaintiffs were bound to demand payment of the first draft on the day it was received, or on the next day, and they had the right to hold until the next day, * * * and a demand on the same day, or on the next day, is, in law, a demand within a reasonable time." 42 N. Y. 538. Upon this point see Phoenix Ins. Co. v. Allen, 11 Mich. 501; Phoenix Ins. Co. v. Gray, 13 Mich. 191; Nutting v. Burked, 48 Mich. 241, 12 N. W. 184; Montelius v. Charles, 76 Ill. 303; Strong v. King, 35 Ill. 9; Bachellor v. Priest, 12 Pick. (Mass.) 399; Prescott Bank v. Caverly, 7 Gray (Mass.) 217; Fall River Union Bank v. Willard, 5 Metc. (Mass.) 216

[79] Bowman v. McChesney, 22 Grat. 609.

sight," was construed as not meaning a term of credit, because an unanswerable question would be raised, as to the period of that credit. And, therefore, in cases of such instruments, and of instruments containing phrases similar to them, such as "payable when demanded," [80] or "on call," or "when called for," [81] all of which mean the same thing, it was adjudged to be the duty of the holder to make the presentation at as early a date as was possible.[82] Similar methods of construction were employed where the instrument failed to express any time of payment at all. In such cases it was reasoned that the instrument would become due some time, and where the parties themselves failed to fix any time, the law fixed one for them, which was immediately. Thus instruments which failed to contain an expression of the time of payment were deemed equivalent to instruments payable on demand,[83] and the rules we have heretofore given applied to them.

[80] Bowman v. McChesney, 22 Grat. 609. A promise made in writing to pay a certain amount on demand, "giving six months' notice for the same," was held to be a good note in the case of Walker v. Roberts, Car. & M. 590. Hall v. Toby, 110 Pa. St. 318, 1 Atl. 369.

[81] Crossmore v. Page, 73 Cal. 213, 14 Pac. 787; Dixon v. Nuttall, 1 Cromp. M. & R. 307.

[82] Merritt v. Todd, 23 N. Y. 28. See, contra, Field v. Nickerson, 13 Mass. 131; Ranger v. Cary, 1 Metc. (Mass.) 369; Furman v. Haskin, 2 Caines, 369. But an instrument on demand after date, with interest, is construed to be a continuing security. Merritt v. Todd, 23 N. Y. 28. The reason is that the words "with interest" imply it was given for time, but demand after date contains no such implication. Crim v. Starkweather, 88 N. Y. 339, where demand must be made in a short time. See, also, Shutts v. Fingar, 100 N. Y. 539, 3 N. E. 588; Parker v. Stroud, 98 N. Y. 379. The student should note that the only real difference between the construction of the terms "on demand" and "at sight" is that, except where modified by statute, a sight bill is entitled, under the common-law rules, to grace, Walsh v. Dart, 12 Wis. 635; Cribbs v. Adams, 13 Gray, 597; Hart v. Smith, 15 Ala. 807; Lucas v. Ladew, 28 Mo. 342, as are bills payable after sight and bills payable on demand, or without specification of time, are not. Oridge v. Sherborne, 11 Mees. & W. 374; Woodruff v. Merchants' Bank, 25 Wend. 673; 1 Pars. Bills & N. 381; Dunkle v. Nichols, 101 Ind. 474.

[83] A note specifying no time of payment is in legal effect payable on demand. This is so even though it provides for interest. First Nat. Bank v. Price, 52 Iowa, 570, 3 N. W. 639; Id., Johns. Cas. Bills & N. 19. "The conclusion of the law is that, where no time of payment is specified in a note, it is payable immediately." Per Curiam, in Herrick v. Bennett, 8 Johns. (N. Y.) 374.

Payment in Installments.

It remains to notice instruments payable in installments. An instrument may be payable in installments due at specified times, or it may be payable in installments due at fixed times, the whole sum to become due on the default in the payment of any installment. And either clause, with what seems a lack of appreciation of sound business methods, the courts declare to be proper for a negotiable instrument.[84] From a business point of view, a man may as well give one piece of paper payable in several installments, as divide up the principal indebtedness and give separate instruments for it. But there is a great difference between such an instrument and one which may become wholly due, at the payee's option, by reason of a default at any one of a series of times. With such an instrument, the indorser can never be quite sure what sum of money he must have at hand wherewith to pay, in case the acceptor or maker does not, and the rule and the ruling of the courts, as they seem at present to stand, may be construed as in derogation of the principles of certainty, which are of the first importance to the negotiability of instruments.[85]

[84] Carlon v. Kenealy, 12 Mees. & W. 139. In this case the note was to become immediately payable on default in payment of the first installment. There was a special demurrer claiming that, since the second installment was payable by way of condition, the note was not negotiable. The following was a portion of the opinion of the court: "It is not a contingency; it depends on the act of the maker himself; and, on his default, it becomes a promissory note for the whole amount." Roberts v. Snow, 27 Neb. 425, 43 N. W. 241.

[85] Miller v. Biddle, 13 Law T. (N. S.) 334. "This was an action upon a promissory note, not made payable to order or bearer, and payable by installments, with a condition that if any installment were not duly paid the whole sum should become due immediately." In accordance with the case of Carlon v. Kenealy, supra, the instrument was held negotiable. Goshen & M. Turnpike Road v. Hurtin, 9 Johns. 217; Washington Co. Mut. Ins. Co. v. Miller, 26 Vt. 77.

PAYMENT OF MONEY ONLY.

23. The instrument must be for payment in the medium of money alone.[86]

24. A negotiable instrument in terms must not be for payment in any other species of property than money.

25. A negotiable instrument must be for the payment of money without connected promise, whether disjunctive or conjunctive, for the performance of some other act.

26. The amount of money to be paid must be certain.

EXCEPTIONS—(a) That the instrument is payable with interest does not destroy its negotiability.

(b) That the instrument is payable with current exchange does not destroy its negotiability.

We have already pointed out that orders for goods were mere equitable assignments. And so promises to pay in goods are likewise nothing more than special contracts for delivery of chattels.[87] And it is our purpose to show briefly why such assignments or promises are contrary to the theory of negotiability.[88]

[86] In an action on a note promising that the maker would be accountable to the plaintiff or his order for £100, value received, it was held that this was equivalent to a promise to pay, since no precise words are requisite to form a promissory note, and in this case the intention was plain, since indorsees could not settle an account with the maker. Morris v. Lee, 1 Strange, 629. In the case of Rex v. Wilcox, the question arose as to whether an agreement to pay "in cash or Bank of England notes" was a promissory note. It was held by a majority of the court that it was not. Bayley, Bills (6th Ed.) 11.

[87] Matthews v. Houghton, 11 Me. 377; Rhodes v. Lindley, Ohio Cond. R. 465; Lawrence v. Dougherty, 5 Yerg. 435; Auerbach v. Pritchett, 58 Ala. 451; Smith v. Boheme, 1 Chit. Jr. Bills, 234; Clark v. King, 2 Mass. 524; Gushee v. Eddy, 11 Gray (Mass.) 502. In Quinby v. Merritt it was held that a written agreement to pay the equivalent of a certain sum in labor did not constitute a promissory note. 11 Humph. (Tenn.) 439.

[88] The written statement that the writer had received a certain sum from the person addressed, and that he was accountable to such person for the same, was held to be a special agreement, and not a promissory note. Horne v. Redfearn, 4 Bing. N. C. 433. An order by the manager of a company, to its cashier,

Definition of "Money."

The meaning of "money," as applied to bills and notes, is determined in the United States by the acts of congress known as the "Legal Tender Acts."[89] Whatever may be used as a legal tender is money. The determining point is whether the medium of payment specified in the bill or note is legal tender for the payment of debts at the place of the payment of the bill or note. There have

"to credit Messrs. Plummer & Co., or order, in cash," was held to be a bill of exchange, since it was an order to hold to the use of a third person, and was equivalent to an order to pay money. Ellison v. Collingridge, 9 C. B. 570. The following promises to pay have been held to constitute good notes: A note payable "in the bank notes current in the city of New York"; on the ground that it is confined to bank paper of known cash value. Judah v. Harris, 19 Johns. (N. Y.) 144. A note payable in Tennessee money. It was held that such a note was, to all legal intents, payable in gold or silver. "The case is different where it is payable in Tennessee bank notes." Searcy v. Vance, Mart. & Y. (Tenn.) 225. As to a note made and indorsed in Michigan, payable in Canada, "in Canada currency," see Black v. Ward, 27 Mich. 191; Phoenix Ins. Co. v. Allen, 11 Mich. 501.

[89] Rev. St. U. S. §§ 3584–3590. Common terms excluded by the above rule are "Funds current," "current money," "currency," "current funds," "current bank paper," "current bank bills," "common currency," "notes receivable in bank," "currency of Missouri," "current bank notes," "bank notes," "New York funds," "Arkansas money," "foreign bills," "Pennsylvania bank bills," "Mississippi bank notes," "York state bills," or "specie." Irvine v. Lowry, 14 Pet. 293; Hasbrook v. Palmer, 2 McLean, 10, Fed. Cas. No. 6,188; Fry v. Reusseau, 3 McLean, 106, Fed. Cas. No. 5,141; Hawkins v. Watkins, 5 Ark. 481; Jones v. Fales, 4 Mass. 245; Young v. Adams, 6 Mass. 182; Leiber v. Goodrich, 5 Cow. 186; State v. Corpening, 10 Ired. 58; Besancon v. Shirley, 9 Smedes & M. 457; Keith v. Jones, 9 Johns. 120; Collins v. Lincoln, 11 Vt. 268; Campbell v. Weister, 1 Litt. (Ky.) 30; Breckinridge v. Ralls, 4 T. B. Mon. 533; Simpson v. Moulden, 3 Cold. 429. With reference to the apparent irreconcilability of some of the cases, Mr. Wood makes the following explanation: "It will be seen, upon examination of the cases, that many of them are not so irreconcilable as at first sight they may appear. Many of them construe the words 'current money, New York funds,' etc., used in bills and notes, to mean lawful gold and silver coin of the United States. A contract for the payment of a certain sum in bank notes or other paper currency may or may not be equivalent to that sum in specie. The extent of the obligation depends on the meaning which usage affixes to the terms at the time the contract was made." Byles, Bills (Wood's Notes) p. 95.

been decisions which have varied from this test. When, by the statute of Victoria,[90] "Canada bills" were made legal tender, the court of Upper Canada said:[91] "It may be that a person can make a promissory note payable in a particular coin, as in gold or silver, because they are respectively money and specie; but I think he cannot make it payable in Canada bills, because they are not money or specie. They have no intrinsic value, as coin has; they represent only, and are the signs of, value. Money itself is a commodity; it is not a sign; it is the thing signified." But the better view is that taken in New York, where the courts[92] declare all descriptions of cash other than legal tender to be "collateral commodities, like ingots or diamonds, which, though they might be received and be in fact equivalent to money, are yet but goods and chattels." The fact that coins of other countries are current in this state does not make them legal tender. It is the words of the law which declare this, and that is the test to be applied.

Payment in Property other than Money.

The real reason for this position probably is that money is the one standard of value in actual business. All other commodities may rise and fall in value, but in theory, at least, money always measures this rise and fall, and remains the same. A bill or note in terms for payment in other property than money is clearly non-negotiable. It cannot be determined from the inspection of the instrument what value is sought to be transferred by it. It thus cannot act as a circulating medium. The chattel which is used as a means of payment may fluctuate in value. Thus, "a note payable in neat cattle,"[93] a promise to pay "in a good horse, to be worth $80.00, and goods out of store amounting to $20.00,"[94]—are non-negotiable. These instruments are special contracts, and not negotiable instruments. The damages recoverable upon them are held to be in some states the actual value of the articles on the day stipulated for pay-

[90] 29 & 30 Vict. c. 10.

[91] Gray v. Worden, 29 U. C. Q. B. 535.

[92] Thompson v. Sloan, 23 Wend. 71.

[93] Jerome v. Whitney, 7 Johns. 322.

[94] Thomas v. Roosa, 7 Johns. 461. For other authorities see Byles, Bills (Wood's Notes) p. 95.

ment;[95] but in New York,[96] although it is admitted that these contracts are merely for the delivery of specific articles, yet when the words were, "To pay J. P. $79.50, Aug. 1st, 1822, in salt, at 14s. per bbl.," it was held that it was intended at the time of making the contract to receive the goods instead of money, and that the goods had, therefore, a fixed value, which must be treated as the measure of damages. In other respects, the debtor must seek his creditor to perform the contract as is the usual rule. If the chattels are ponderous, the maker of the note must seek the payee, and see where he will receive them.

Payment in Foreign Money.

There is one deviation from this rule, which it is important to notice. Where a bill or note is made payable in money of a foreign denomination, it is still negotiable.[97] This is because the courts, under the statutes of the United States,[98] will take judicial notice of the fact that the value of foreign coin, as expressed in the money of account in the United States, shall be that of the pure metal of such coin of standard value; and that the value of the standard coin of the various nations of the world in circulation is estimated annually by the directors of the mint, and proclaimed on the first day of January by the secretary of the treasury. These foreign denominations therefore can always be paid in our own coin of equivalent value, to which it is always reduced on a recovery.[99] In an action upon such an instrument the course is to prove the value

[95] McDonald v. Hodge, 5 Hayw. (Tenn.) 85; Edgar v. Boles, 11 Serg. & R. 445; McGehee v. Posey, 42 Ala. 330.

[96] Pinney v. Gleason, 5 Wend. 393. Vermont, Connecticut, and Ohio have a similar rule. Culver v. Robinson, 3 Day (Conn.) 68; Perry v. Smith, 22 Vt. 301.

[97] In the case of St. Stephen Branch Ry. Co. v. Black, which was an action on a note payable in United States currency, it was held that such note was for the payment of money only, since the equivalent was ascertainable, and the note was negotiable. 2 Hann. (N. B.) 139. A bill drawn in Montreal on a firm in New York, payable in New York in dollars, was held to be negotiable, as it had all the qualities of a bill of exchange, and was payable absolutely and in money. Chrysler v. Renois, 43 N. Y. 209.

[98] Rev. St. U. S. § 3564.

[99] 2 Chit. Bills (Am. Ed. 1839) 615, 616; Deberry v. Darnell, 5 Yerg. 451.

of the sum expressed in our own tenderable coin, because the instrument can be construed by the courts to be payable in no other.[100] In the calculation of this sum there is to be added the item called "exchange." This means the difference in value in the same amount of money in different countries. Thus, in the illustration in the footnote to section 10, if there were more debts due from England to Jamaica than from Jamaica to England, the demand in England for bills on Jamaica will be greater than the demand in Jamaica for bills on England. Hence, in England, where there are many debtors to creditors in Jamaica, it will be more expensive to procure a bill on Jamaica than it would be, in Jamaica, to procure a bill on England. Thus B, in England, would be obliged to pay A something for the debt C, in Jamaica, owes to A, in England, because the other English debtors will willingly pay something to avoid the risk and expense of transmitting money to discharge their debts. And thus B must pay A something in addition for the draft which A sells him, and which A could otherwise sell in the open market. This something is the amount which it will cost to replace the £1,000 in England in Jamaica, or which the right to a sum of money due in Jamaica will produce in money in England. The rate of cost depends upon the balance of trade with England; and if it is excessive and is sufficient to pay the expenses of exporting the precious metals, gold will be sent in preference to bills of exchange purchased at the current rate.[102] This item, as has been said, is to be added, and the courts construe the instrument to mean, where it is drawn in one country, payable in another, and the amount is expressed in the money of the former, that the amount must be calculated according to the rate of exchange on the day the instrument is payable.[103]

Performance of Other Acts in Addition to Payment of Money

The reasons already given have guided the courts in laying down the rule that the order or promise must not be for the payment of money

[100] Thompson v. Sloan, 23 Wend. 71; Bayley, Bills (Am. Ed. 1836) 23.

[102] Schermerhorn v. Talman, 14 N. Y. 93, page 136.

[103] Grant v. Healey, 3 Sumn. 523, Fed. Cas. No. 5,696; Smith v. Shaw, 2 Wash. C. C. 167, Fed. Cas. No. 13,107; Lee v. Wilcocks, 5 Serg. & R. 48; Bank of Missouri v. Wright, 10 Mo. 719; Scott v. Bevan, 2 Barn. & Adol. 78; Cash v. Kennion, 11 Ves. 314.

and the performance of some other act.[104] The authority generally quoted on this point is Martin v. Chauntry.[105] This instrument was a note "to deliver up horses and a wharf and to pay money." It was held not to be a note within the statute of Anne; for, said Baron Parke in a later case,[106] to constitute a promissory note the promise must be to pay a sum certain and nothing else.[107] The reason for this is that to ingraft a special agreement upon a general promise to pay money would be at once to defeat its practical usefulness as a quasi money. Professor Ames, with his usual force, points out the objections: "One could be indorsed, the other would have to be assigned. In some jurisdictions the action could be brought by the indorsee in

[104] The fact that a note contains a contract as to collateral security, and provides the means for converting the security, will not deprive it of its negotiable property. The persons indorsing such instruments undoubtedly intend to stand in the position, and to incur the liabilities, of indorsers of commercial paper. Arnold v. Rock River V U. R. Co., 5 Duer (N. Y.) 207. In the case of Hosstatter v. Wilson, it was held that a note promising to pay at a certain time in money (or in goods on demand) was a good promissory note. The maker has no election to do otherwise than to pay money, though the holder may elect to take goods. 36 Barb. (N. Y.) 307. A promissory note will not be affected, in its character as such, by a memorandum attached that deeds are deposited as collateral security. "This is an absolute promissory note. * * * The instrument is quite valid." Wise v. Charlton, 4 Adol. & E. 786. In Leonard v. Mason the following was subscribed to a promissory note: "Levi Mason, Esq.: Please pay the above note, and hold it against me in our settlement. N. Leonard." And such request was held to be a good bill of exchange. "The retaining the voucher is no more the performance of another act beside the payment of the money, than the retaining the order for the same purpose." 1 Wend. (N. Y.) 522. In the case of Overton v. Tyler, it was decided that a judgment note was not negotiable under the laws of Pennsylvania. "The negotiability of the note * * * was instantly liable to be merged in a judgment, and its circulation arrested by being attached as an incumbrance to the maker's land." 3 Pa. St. 346. A note which, in addition to the regular form, waived "the right of appeal, and of all valuation, appraisement, stay, and exemption laws," was held to be a promissory note, as it was a written promise to pay at a certain time, "for value, with interest, absolutely and at all events." Zimmerman v. Anderson, 67 Pa. St. 421.

[105] Martin v. Chauntry, 2 Strange, 1271.

[106] Follett v. Moore, 4 Exch. 416.

[107] Cook v. Satterlee, 6 Cow. 108; Fletcher v. Thompson, 55 N. W. 308; First Nat. Bank of Port Huron v. Carson, 60 Mich. 433, 27 N. W. 589.

his own name, but as assignee he could only sue in the name of his assignor. In the case of the negotiable instrument being in the hands of a bona fide holder, no defense of fraud or latent equity would avail; in case of the holder as assignee, all would avail." In spite of these objections the foregoing rule is much modified in later cases. They are classified by Mr. Daniel [108] at length. They are of three kinds: (1) Power to confess judgments; (2) waiver of exemptions; (3) stipulations for the payment of expenses of collection and attorneys' fees. These instruments, in jurisdictions in which they are used, are deemed negotiable, because they facilitate, rather than clog circulation. Further, they do not contemplate performance until after the note or bill is due, and therefore are not in violation of the principles of negotiability, because a negotiable instrument ceases to be negotiable in its fullest sense after it has become due.

Certainty as to Amount of Money.

The last of the series of principles referring to the payment of money is that the order or promise must be for the payment of a definite sum of money.[109] By this is meant that it must specify exactly the sum of money to which it relates. It would be useless in the operations of discount if the purchaser were obliged to have reference to other documents perhaps not then before him, to ascertain its value. And accordingly, in the leading case upon the point,[110] where the instrument was in form to pay £65, "and also all other sums which may be due," Lord Ellenborough declared that since the total sum was not specified, and could not be ascertained otherwise than by reference to books to ascertain the amount due, the promise was neither a definite promise, nor was it a single and distinct one. To follow any other rule would be to nullify the legal effect of the instrument, which is itself the right of action. To produce it, and to prove it in court, is sufficient to establish a prima facie case. And the courts, in cases of orders or promises to pay "whatever sums you may collect," [111] or "the demands of a sick

[108] Daniel, Neg. Inst. §§ 61, 62, 62a.

[109] Cushman v. Haynes, 20 Pick. 132; Philadelphia Bank v. Newkirk, 2 Miles, 442; Jones v. Simpson, 2 Barn. & C. 318; Clarke v. Percival, 3 Barn. & Adol. 660; Aurey v. Fearnsides, 4 Mees. & W. 168.

[110] Smith v. Nightingale, 2 Starkie, 375.

[111] Legro v. Staples, 16 Me. 252.

club,"[112] have wisely denied to them the privilege of negotiability. This rule does not, however, exclude from negotiability paper with such terms as "with interest," or "with current exchange."[113] The canon of construction is, "Id certum est quod certum reddi potest." And in such instruments the mere inspection of the paper itself enables the holder, by an almost mechanical computation, to ascertain just what sum is due upon it at any given time. And therefore such instruments may be deemed to specify a given sum of money as definitely as though they had stated the interest or the exchange in figures themselves.[114] Of course it may be urged, and in fact, by text writers,[115] has been urged, that an instrument payable with current exchange is invalid because the fluctuations in the rate of exchange make it impossible to ascertain the amount payable when the bill is issued and because proving the meaning of "with current exchange" necessitates evidence outside of the instrument. But these views thus taken are rather of the letter of the law than of its spirit. The law merchant is the result of the custom of merchants, and the statute of Anne is the result of the law merchant. It is the custom, convenience, and sound business policy of merchants to induct into negotiable instruments the theory of exchange, and this reason, therefore, if no other, makes exchange a necessary modification of the general rule we have laid down.

[112] Bolton v. Dugdale, 4 Barn. & Adol. 619.

[113] The fact that an instrument for the payment of a specific sum of money is made payable with "current exchange" on some other place than the place of payment does not prevent its being a promissory note. Hastings v. Thompson (Minn.) 55 N. W. 968; Johns. Cas. Bills & N. 33; see, also, Smith v. Kendall, 9 Mich. 241; Johnson v. Frisbie, 15 Mich. 286. There have, however, been contrary holdings as to this point, as in the case of Philadelphia Bank v. Newkirk, 2 Miles, 442.

[114] Smith v. Kendall, 9 Mich. 241; Grutacap v. Woulinise, 2 McLean, 581, Fed. Cas. No. 5,854; Leggett v. Jones, 10 Wis. 34. In the case of Sperry v. Horr, it was held that an agreement to pay a certain sum, providing that if not paid on maturity, and suit were brought thereon, the maker would pay collection and attorney fees, was a good promissory note. No inquiry was necessary on maturity, as to facts not appearing on the face of the instrument. "The agreement for the payment of attorney fees * * * simply imposed an additional liability in case suit should be brought." 32 Iowa, 184.

[115] Edw. Neg. Inst. § 154; Benj. Chalmers, p. 18, and decisions; Lowe v. Bliss, 24 Ill. 168; Philadelphia Bank v. Newkirk, 2 Miles, 442; Read v. McNulty, 12 Rich. Law, 445.

SPECIFICATION OF PARTIES.

27. The instrument must be specific as to all its parties.

28. By signature is meant any written emblem made by a person with the intent of entering into a contract obligation.

29. The note or bill must contain the signature of the maker or makers, drawer or drawers.

30. The bill must be addressed to some person.

EXCEPTIONS—(a) If the drawee can be otherwise sufficiently identified from the bill it is sufficient.

(b) An unaddressed bill accepted or a bill accepted, where the drawer and acceptor are one and the same person, probably is to be treated as a promissory note, and is negotiable.

31. The bill or note must point out some person to whom the money is to be paid.

The following are the common rules concerning the nomination of payees:

(a) The payee of an instrument, except one payable to bearer, must be a person in being, natural or legal, and ascertained, at the time of issue.

(b) Where the payee and maker or drawer are the same person, the instrument is not issued until after its indorsement and delivery.

(c) The payee may be a fictitious or nonexisting person, but the instrument is then construed as payable to bearer, and title thereto is made by estoppel.

Definition of Parties.

In the acceptation of the term as hereinafter applied to "parties," the meaning of the word "parties" is somewhat more narrow than its strict legal one. In its strict legal definition a party to a con-

tract is one to whom its operation as a legal contract is confined. And while the holder of a bill or note indorsed in blank, or made payable to bearer, or claiming it under equitable assignment, is in the widest sense of the word no less a party to it than any of its actual indorsers, still the courts usually designate as "parties" only those who appear by name on the face or back of the instrument.

Signature of Parties.

A person is made a party by his signifying by his signature or some other written emblem upon the instrument that he intends to be bound by the instrument. A signature in pencil,[116] a signature made by another person but attested by a mark,[117] an indorsement upon the back of the note in form "7, 2, 8," made with the intention of indorsing,[118] are such evidences of intention. The question is whether the signer intended to bind himself or not.[119] As matter of theory and of law, and for the reason that the note being an evidence of obligation should point out on its face the party who primarily assumes that obligation, it is necessary that there should be a drawer or maker somewhere specified in the instrument. But as long as the signature or emblem of the drawer or maker appears anywhere upon the instrument it is deemed prima facie evidence of his intention to be bound by its obligation.[120] It is immaterial

[116] Geary v. Physic, 5 Barn. & C. 234; Reed v. Roark, 14 Tex. 329; Baker v. Dening, 8 Adol. & E. 94.

[117] George v. Surrey, Moody & M. 516; Shank v. Butsch, 28 Ind. 19.

[118] Brown v. Butchers' & Drovers' Bank, 6 Hill, 443.

[119] Selby v. Selby, 3 Mer. 2; Lucas v. James, 7 Hare, 419; Boardman v. Spooner, 13 Allen, 353; Brayley v. Kelly, 25 Minn. 160.

[120] Palmer v. Stephens, 1 Denio, 471; Merchants' Bank v. Spicer, 6 Wend. 443. The payment by the drawee of a bill of exchange is an admission of the drawer's signature, which he may not afterwards dispute, as between himself and the holder; and he cannot compel the holder to whom he has paid the bill to return the sum paid, where the drawer's signature is discovered to be a forgery. Bank of Commerce v. Union Bank, 3 N. Y. 230; Price v. Neal, 3 Burrows, 1354. Such payment, however, is not an admission of the genuineness of the body of the bill. Bank of Commerce v. Union Bank, supra. As to the effect of a signature made in the presence of the owner, and by his authority, see Sager v. Tupper, 42 Mich. 605, 4 N. W. 555; Coy v. Stiner, 53 Mich. 42, 18 N. W. 552. As to the effect of acknowledging a forged signature, see Phillips v. Ford, 9 Pick. 39; Wellington v. Jackson, 121 Mass. 157.

in what part of the instrument the name appears, whether at the top, in the middle, or at the bottom.[121] Anything from which it will appear that a person intended to make the instrument his own is sufficient.[122]

Certainty as to Parties.

The instrument bearing upon its face means of identifying the parties to it, it must further appear that these parties are capable of exact ascertainment, otherwise the instrument is non-negotiable. In Gibson v. Minet,[123] Chief Baron Eyre declared: "If I put in writing these words: 'I promise to pay £500 on demand, value received,' without saying to whom, it is waste paper. If I direct another to pay £500 at some day after date, for value received, and not say to whom, it is waste paper." [124] But it is probable that this restriction is limited to the negotiability of the paper. This is because, under the law merchant, a negotiable instrument must show from its inspection the parties to it, except where it is made payable to bearer. Such is the clear import of the doctrine laid down in Evertson v. National Bank of Newport,[125] where certain warrants in form: "$35. Interest Warrant for Thirty-Five Dollars. $35.00 upon bond No. [filled in with ink] of Danville R. R. Co., payable in gold coin at the office of the Farmers' Loan & Trust Co.," and duly signed, were held non-negotiable, because, as the court of appeals said, the statute embodies the law, and determines what instruments shall be negotiable; and the court seems to imply that, except in the case of giving the instrument a transferable quality,* even though it be the intent of the parties to make the instrument negotiable, still they cannot do so

[121] Clason v. Bailey, 14 Johns. 485; Saunderson v. Jackson, 2 Bos. & P. 238; Welford v. Beazely, 3 Atk. 503.

[122] In the case of Taylor v. Dobbins, it was held that the allegation that the note was that of the defendant, and that "manu sua propria scripsit" was sufficient without his signature at the end, since his name appeared in the instrument. 1 Strange, 399.

[123] 1 H. Bl. 618.

[124] Walrad v. Petrie, 4 Wend. 576; Ferris v. Bond, 4 Barn. & Ald. 679; Douglass v. Wilkeson, 6 Wend. 637; Heman v. Francisco, 12 Mo. App. 560.

[125] 66 N. Y. 15, 19.

* See supra, § 9.

where the statute in other respects has not in words invested the form of instrument with the quality of negotiability which always depends upon the terms of the instrument itself, and not the intent of the parties.

These cases, it is hoped, show the general rule that, where the parties are indefinite, the negotiability of the instrument is destroyed. The elementary decisions go further than this where any of the parties necessary to the creation of the instrument fail to appear upon it. Without a maker to a promissory note, or a drawer to a bill of exchange, the instrument is inoperative.[126] In McCall v. Taylor[127] an unsigned instrument was said to be an inchoate instrument, by which was meant that some one should have signed it to set it in circulation. This doctrine is limited by a principle sometimes found that, if a bill be drawn without the drawer's signature, formally accepted, and then delivered to a creditor, a right will prima facie be presumed in the creditor to insert his own name as drawer, and treat the bill as a valid one. This is because the issuing of the acceptance can only mean that the acceptor intended to put it in the power of any person to whom he gave it to fill it up, or, in other words, to have intended the natural consequence of his act. It is immaterial whether the acceptor issues the bill to the person who drew the bill or not. It is presumed that the bill was given with the intention of putting it into circulation, and, until it is shown that such was not the fact, the courts will maintain that presumption.[128]

[126] Vyse v. Clarke, 5 Car. & P. 403; May v. Miller, 27 Ala. 515; Tevis v. Young, 1 Metc. (Ky.) 197; Reg. v. Harper, 13 Cent. Law J. 174; Stoessiger v. South E. Ry. Co., 3 El. & Bl. 549, 23 Law J. Q. B. 293.

[127] 34 Law J. C. P. 365. In this case, a note was written in this form: "Four months after date, pay to my order the sum of three hundred pounds for value received. To A. B." There was neither date nor signature of drawer, but the name of the defendant was across its face. It was held that this could not be sued on as a bill or note, since it was an incomplete instrument.

[128] Harvey v. Cane, 34 Law T. (N. S.) 64. In this case the bill without the name of the drawer was accepted by the defendant, and given by him to C., by whom it was given to the plaintiff, who inserted his own name. It was held that the acceptance was with a view to negotiation and that C. gave what authority he had, to the plaintiff. See Moiese v. Knapp, 30 Ga. 942; Hopps v. Savage, 69 Md. 516, 16 Atl. 133.

Designation of Drawee.

So, also, the elementary principle is that, without a drawee, the instrument cannot be treated as a valid one.[129] It is not a bill of exchange. The reason for this is that the first essential of a bill is an order, and, a drawee not being nominated, the instrument must fail. It is inherent in its nature that there must be a drawee, who in theory has funds of the drawer, which he is bound to apply upon the draft. The courts, however, have limited this principle wherever it was consistent with common sense to do so. Their idea appears to have been that, if there was an actual obligation to enforce, they would enforce it despite technical inaccuracies. Hence the courts have taken any reason to support the instrument as an obligation, rather than let it fall to the ground. In Peto v. Reynolds [130] Barons Parke and Alderson both agree that if the instrument, which was unaddressed, could be shown to be evidence of an obligation, then, while they could not treat it as a bill, because of the absence of the drawee's name, they would hold it to be a promissory note. This is the principle found in Block v. Bell,[131] where the word "Accepted," over a signature, written across an instrument which has the form of a demand promissory note, is construed as such an indorsement of the obligation intended to be evidenced by the invalid instrument that it is equivalent to a promise to pay it. And the courts go so far as to say that, if the drawee be not specified in the bill, but otherwise capable of identification from it, that will suffice. In Gray v. Milner,[132] the bill was addressed, "Payable at No. 1 Wilmot St., opposite the Court Bethnal Green, London," and the argument was that, not being addressed to any one, it was not a bill of exchange. It appeared, however, in answer to this, that "Accepted. Chas. Milner" was written across the face of the bill. The court found that this was

[129] An action was brought on the following writing: "Oct. 21, 1804. Two months after date, pay to the order of John Jenkins £78, 11s., value received. Thos. Stephens. At Messrs. John Morson & Co." It was held that the instrument was a bill of exchange, and that Morson & Co. could be considered the drawees. Shuttleworth v. Stephens, 1 Camp. 407.

[130] 9 Exch. 410.

[131] 1 Moody & R. 149.

[132] 8 Taunt. 739.

the only person who could have been meant, because Milner had himself acknowledged his liability by writing his acceptance on the bill. Of Gray v. Milner it may be said that it can only be supported upon the theory that a bill of exchange made payable at a particular place of residence or of business can only be meant to be addressed to the person who resides or does business at that place. But it may also be said that such is certainly a very strained construction of the law,[133] and it is to be questioned whether the courts would to-day adopt such a view of this rule if the case were presented to them afresh.[134] It would seem, rather, subject to the rule of interpretation governing ambiguous instruments, that its acceptance must evidence an intention to have incurred an obligation, and since it did not fulfill the requisites of a bill of exchange, the holder might treat it as a promissory note,[135] and the courts would perhaps give it effect as such. The principle is the same where the drawer and drawee are ostensibly different, though in law the same person. In Fairchild v. Ogdensburgh R. Co.,[136] the instrument was an order drawn by the president of the railroad upon its treasurer directing the latter to pay A B, or order, a certain sum of money, and was, in effect, an order of the corporation upon itself. Here the court of appeals said, because there were not the two parties requisite for a bill of exchange, the instrument was not a bill of exchange, but, following the authority of the English courts, that it was a promissory note.

Designation of Payee.

Another elementary principle of the form of a negotiable instrument is that the payee must be definitely ascertained.[137] By this

[133] Davis v. Clarke, 6 Q. B. 16; Story, Bills (Bennett's Ed.) 58; 1 Pars. Notes & B. 62.

[134] Ball v. Allen, 15 Mass. 435; Watrous v. Halbrook, 39 Tex. 572.

[135] Edis v. Bury, 6 Barn. & C. 433; Block v. Bell, 1 Moody & R. 149; Drummond v. Drummond, reported in 1 Ames, Bills & N. p. 883, though see, contra, Stuhlteworth v. Stephens, 1 Camp. 407; Allan v. Mawson, 4 Camp. 115; Rex v. Hunter, Russ. & R. 511.

[136] 15 N. Y. 337.

[137] Tittle v. Thomas, 30 Miss. 125; Bennington v. Dinsmore, 2 Gill, 348; Rich v. Starbuck, 51 Ind. 87; Storm v. Stirling, 3 El. & Bl. 832; Adams v. King, 16 Ill. 169; Gray v. Bowden, 23 Pick. (Mass.) 282; Osgood v. Pearsons, 4 Gray (Mass.) 455; Noxon v. Smith, 127 Mass. 485. A bill drawn by

seems to be meant that the payee must have some identity. And the test, where any payee is attempted to be specified, is, does the instrument by any construction point out as payee some person, natural or legal, with whom a contract can be deemed to have been made, and by whom it can be enforced. In the note, "I promise to pay the estate of Moses Lyon, deceased," [128] while there was a payee attempted to be specified, still there was no such person, natural or legal, in existence. It could not be Moses Lyon. It might be his executor or representative, it might be his heir, and the court would not and could not fix upon which it was, where neither was specified. Like this last case, and perhaps more clear in its application, is the one usually quoted as the leading one on this point,[129] where a note was made payable nine months after date "to the secretary for the time being of a certain society." This

a specified party, and payable to —— or order, was held not to be a bill of exchange, by reason of the lack of a payee. Rex v. Randall, Russ. & R. 195. In Knight v. Jones, the promise to pay a certain person or heirs was held sufficiently certain as to payee. 21 Mich. 161. An order to "pay to your order" was held not a bill of exchange, although accepted by drawee, since there was not sufficient certainty as to payee. "It was nothing more than a request to a man to pay himself, and the acceptance * * * laid the acceptor under no obligation to a third party." Reg. v. Bartlett, 2 Moody & R. 362. It was held in Cruchley v. Clarance that the issuing a bill in blank, without the name of the payee, was an authority to a bona fide holder to insert the name. 2 Maule & S. 90. A note being made "payable to one or the other of two parties, it is payable to either only on the contingency of its not having been paid to the other, and so is not a good promissory note, under the statute." Abbott, C. J., in Blanckenhagen v. Blundell, 2 Barn & Ald. 417. In the case of Fisher v. Pomfret it was held by the court that a bill of exchange to a man and his order is one and the same with one payable to his order only. 12 Mod. 125. In Com. v. Dallinger it was held that an agreement to pay to the order of the maker was a good promissory note, when indorsed by the maker. 118 Mass. 439.

[128] Hendricks v. Thornton, 45 Ala. 309; Shaw v. Smith (Mass.) 22 N. E. 887; Lyon v. Marshall, 11 Barb. 242. But good if payable to administrators of A, deceased, Adams v. King, 16 Ill. 169; Moody v. Threkeld, 13 Ga. 55; or to trustees of the will of A, Megginson v. Harper, 2 Cromp. & M. 322; or the heirs of A, Bacon v. Fitch, 1 Root, 181; because payee is ascertainable.

[129] Cowie v. Stirling, 6 El. & Bl. 333. As distinguished from this decision, in the case of Holmes v. Jaques, upon a promise to pay "trustees or their secretary for the time being," the secretary was held to be merely the agent, and not as acting in an independent capacity, and the promise was

was a promise to pay some one whom the maker did not know, and who might be secretary of the society nine months hence. And clearly, there was no party with an assenting mind to be a party to a contract.

It will perhaps illustrate this idea to show in contrast instruments very similar in language but widely different in principle. In contrast to a promise to pay the secretary for the time being is the promise in Davis v. Garr.[140] There the promise was to pay certain persons designated as the "trustees or their successors in office." This was held to constitute a good promissory note, because there was a perfected contract with definite persons. The mere fact that the rights of these persons were entailed upon their legal successors did not vitiate the contract, for all contract rights devolve and are assignable. So, in contrast to a promise to pay A or B, the promise "to pay A, B, & C, or to their order, or the major part of them," [141] is good as a promissory note, because there was a joint interest in the parties, who, taken together, constituted a distinct legal entity, or one person in view of law.

Payment to Order of Maker or Drawer or Fictitious Person.

There is another aspect of the payee as a party to the instrument which should be noticed. It is when the instrument is drawn payable to the order of the maker or drawer or of a fictitious person. In Hooper v. Williams,[142] the court explained that notes payable to the maker's order were incomplete instruments, and had no binding effect until indorsed. No right to sue could exist in any one in case of such a note until the order was made in the shape of an indorsement. Until that indorsement was made it was an imperfect instrument, and in truth not a promissory note at all. It was perfected by an indorsement to another person, because the original writing and indorsement, taken together, became a binding contract, though an informal one, between the maker and the indorsee. In case of a bill of exchange or note made payable to the

held to be good, since there was no uncertainty as to payee. L. R. 1 Q. B. 376.

140 6 N. Y. 124; Porter v. City of Janesville, 3 Fed. 619.

141 Watson v. Evans, 1 Hurl. & C. 662.

142 2 Exch. 18.

order of a fictitious person, Lord Ellenborough [143] is supposed to have held that such a bill was neither in effect payable to the order of the drawer nor to bearer, but was completely void. This rule, however, he afterwards qualified by the statement: "Unless it can be shown that the circumstance of the payee being a fictitious person was known to the acceptor." He thus made the acceptor liable by estoppel, and this is probably the present attitude of the courts. In New York this doctrine is changed by statute to the effect that a note "made payable to the order of the maker thereof, or to the order of a fictitious person, shall, if negotiated by the maker, have the same effect and be of the same validity, as against the maker and all persons having knowledge of the facts, as if payable to the bearer." [144] This statute, the wise spirit of which has been followed in other jurisdictions,[145] is extended in New York in its operation. In Mechanics' Bank v. Straiton [146] the check in suit was demurred to because it was in form: "Pay to bills payable, or order." It was declared by the general term of the supreme court to be non-negotiable, but the court of appeals said that by using the words "or order" the maker showed he intended that the instrument should be transferred, and be negotiable. In naming the persons to whose order the instrument is payable the maker limits the negotiability to those persons, and imposes the condition of indorsement upon them upon its first transfer. But no such intention is indicated by a fictitious or an impersonal payee; hence words of negotiability, in such connection, are capable of no reasonable interpretation except that the bill shall be negotiable without indorsement. In other words, it is to be treated in the same manner as if it had been made payable to bearer. In Irving Nat. Bank v. Alley [147] the court goes further. It holds that, even where a party upon a note of this character, against whom a liability is sought to be enforced, does not have knowledge of the facts, in all other cases than that of the fictitious payee, he cannot raise the point that it

[143] Bennett v. Farnell, 1 Camp. 130.
[144] Rev. St. N. Y. p. 2499, § 5; Pleta v. Johnson, 8 Hill, 112.
[145] Foster v. Shattuck, 2 N. H. 446.
[146] 3 Abb. Dec. 269.
[147] 79 N. Y. 530.

was payable to the maker's or drawer's order, but will be estopped from doing so. Thus the old common law is substantially changed, and a wiser and more equitable one would probably now prevail.[148]

CAPACITY OF PARTIES.

32. The capacity of parties is in general governed by the same rules as their power to make a contract. It is of two kinds:

(a) Capacity to incur liability.

(b) Capacity to transfer the instrument.

33. The following classes of persons incur no liability, though they may make a valid transfer of the instrument:

(a) A person non compos mentis.[149]

(b) An infant.[150]

(c) In some jurisdictions, a married woman.[151]

(d) A corporation, when the act is ultra vires.[152]

34. The following persons may transfer, but are bound personally by the transfer:

(a) Executors.

(b) Administrators.

(c) Guardians.

(d) Trustees.

(e) An agent for a principal, whether disclosed or undisclosed.

The generic principles governing the capacity of parties to contracts are not changed in their application to bills and notes. A full discussion of that liability belongs more properly to a work upon the general subject of contracts than to a work of this character.

148 Farnsworth v. Drake, 11 Ind. 101; Forbes v. Espy, 21 Ohio St. 474; Lane v. Krekle, 22 Iowa, 399.

149 See post, § 98, pp. 216–223, note.

150 See post, § 94, pp. 208–210.

151 See post, § 95, pp. 210, 211.

152 See post, § 96, pp. 211–216.

The defenses of persons non compos mentis, infancy, coverture, and of transcending corporate powers, and their effect upon the position of the bona fide holder, will be considered to a limited degree later on. We speak here in a most general way of persons acting in a representative capacity as parties to negotiable paper.

Executors, administrators, guardians, and trustees occupy at least one general property relation in common: an estate is committed to them to apply. An executor or administrator is the hand of the court to collect property and pay debts. A guardian or trustee has, in addition to these functions, to hold property, and to keep it intact as far as in ordinary human prudence it can be done. They hold this property, as the law phrases it, in "autre droit," which means that they hold for others, and not in their own right. They are allowed by law to charge the estates left in their care with certain disbursements, which, in general, are those necessary to carry into force and effect the estates which they are to administer. But, aside from these, the estate cannot be bound. It cannot, for example, be bound by an executory contract. If the representative makes such a contract, the law, in order that the obligation may stand, rather than fall, holds the representative personally responsible, not the estate which he represents. Thus in the case of the executory contract of negotiable paper, the law deems the descriptive character setting forth the representative character in which the party has signed as surplusage, and treats it as his personal obligation.[153] This principle is extended so far that an executor is not permitted to charge the estate, although he is expressly authorized to do so by the terms of the will under which he acts.[154] This, however, does not preclude the power of transfer. If a bill or note be negotiable, it may be indorsed, but the executor,

[153] See Willis v. Sharp, 113 N. Y. 586, 21 N. E. 705. The main cases on this point are Austin v. Munro, 47 N. Y. 360; Ex parte Garland, 10 Ves. 119; Fairland v. Percy, L. R. 3 Prob. & Div. 217; Labouchere v. Tupper, 11 Moore, P. C. 198; Downs v. Collins, 6 Hare, 418. See, also, Thompson v. Whitmarsh, 100 N. Y. 35, 2 N. E. 273.

[154] Delaware, L. & W. R. Co. v. Gilbert, 44 Hun, 201. Modified by Willis v. Sharp, 113 N. Y. 586, 21 N. E. 705, which holds that where a will directs an executor to carry on business the funds of the estate in the business are bound in equity for the payment of debts. It, however, admits that the executor is personally liable in the first event.

guardian, or trustee indorsing is personally liable unless he exempts himself by an indorsement without recourse.[155]

The idea underlying this is the same with regard to agents. The principal text relates to cases where the name of the agent appears upon the instrument, and that of the principal does not, or where the name of the principal appears in such a way as to leave it doubtful who was the party to the bill; for if the bill or note be drawn or indorsed "A B, by C D," or "A B, by his attorney, C D," it appears clearly that A B was the party to the instrument, provided C. D. had the right to place his name there. So, also, "C D, for A B," or "C D, agent for A B," is a term usual and proper to create an agency; and in such cases A B would be bound. It would seem to be the safer rule that no party can be charged as principal upon a negotiable instrument unless his name is thereon disclosed,[156] and that, where one person signs or indorses an instrument in his own individual name, though in fact as an agent for another, all evidence must be excluded to show that it was intended at the time of the signing to bind the liability upon another.[157] The reason for this is that a negotiable instrument must show exactly what it is upon its face, in order to be a negotiable instrument. The cases adopting this wise rule go to the extent of saying that this principle applies even though it was known that the signer was an agent, and sometimes it is in fact agreed that the person signing shall only create a liability to bind some other person. But any such evidence clearly contradicts the terms of a written instrument. Hence, in a bill made by, payable to, or indorsed by, "J S, agent," the word "agent" is surplusage, and J S is personally liable. This is not the law in some of the states. It is doubtful whether it is the law in New York. Such authorities as Mott v. Hicks,[158] Green v. Skeel,[159]

[155] Rex v. Thom, 1 Term R. 487; Childs v. Monins, 5 Moore, 282; Harrison v. McClelland, 57 Ga. 531; Tryon v. Oxley, 3 G. Greene, 289; Davis v. French, 20 Me. 21; Wisdom v. Becker, 52 Ill. 346.

[156] Arnold v. Sprague, 34 Vt. 409; Pease v. Pease, 35 Conn. 131; Texas L. & T. Co. v. Carroll, 63 Tex. 51; Stackpole v. Arnold, 11 Mass. 27; Hyde v. Paige, 9 Barb. 150.

[157] Nash v. Towne, 5 Wall. 689.

[158] 1 Cow. 540.

[159] 2 Hun, 486.

and Moore v. McClure,[160] lay down a different doctrine. It appears to have been the sense of the court in Mott v. Hicks that extrinsic testimony might be admitted to show that where an indorser signed his name as agent it was competent to show that it was agreed between the parties that such indorsement was merely for the purpose of transfer, and that the indorser, as agent, was not personally liable. This is also the doctrine in Green v. Skeel, where it is held that a person signing his name as agent in the business of his agency is not personally liable. On the other hand, in De Witt v. Walton,[161] the addition of the word "agent" is treated as mere descriptio personae, and this is emphasized and affirmed in Pumpelly v. Phelps,[162] and in a dictum in Briggs v. Partridge [163] this is further approved.

DELIVERY OF INSTRUMENTS.

35. An undelivered bill or note is inoperative, because delivery is essential to the final completion of every written contract. Until delivery, the contract is revocable.

36. Delivery means transfer of possession with intent to transfer title, and is of two kinds:

(a) The manual passing of the instrument itself.

(b) Some act manifesting intent to transfer right of possession while the possession of the bill is actually with another.

37. Escrow means a delivery of a bill or note to a third person to hold until certain events happen, or certain conditions are complied with.

[160] 8 Hun, 558. See, also, May v. Hewitt, 33 Ala. 161. In the case of a note signed in Florence and delivered in London, it was claimed that the cause of action arose in the former place, but it was held that no contract arose until its delivery, and that consequently it came under the jurisdiction of such place of delivery. Chapman v. Cottrell, 13 Wkly. Rep. 843.

[161] 9 N. Y. 571.

[162] 40 N. Y. 59.

[163] 64 N. Y. 359, at page 363.

The inception of a note is defined by Judge Platt to mean "when it was first given, or when it first became the evidence of an existing contract."[164] It has no legal inception until it is delivered as evidence of a subsisting debt.[165] Merely writing and signing a bill or note, and retaining it in the hands of the drawer or maker, forms no contract.[166] No person has then a right of action upon it any more than if it were blank paper. The inception of the paper is when there came into existence a right of action upon it.[167] This is because while the note or bill is in the maker's hands, it can be erased, canceled, or revoked.[168] It cannot, therefore, be an evidence of indebtedness until it is beyond such possibility. The decisive step for this is the delivery.[169]

Two things must concur in a delivery. The first is the transfer of the possession of the instrument, the second an intent to transfer the title on the part of the transferer, and the acceptance of the instrument by the transferee with intent to acquire title to it. The

[164] Marvin v. McCullum, 20 Johns. 288.

[165] Delivery is essential to the validity of a bill or note. Meeker v. Shanks, 112 Ind. 207, 13 N. E. 712, Johns. Cas. Bills & N. 31. "As a general rule, a promissory note, like any other written contract, has no legal inception or valid existence, as such, until it has been delivered in accordance with the purpose and intent of the parties." Burson v. Huntington, 21 Mich. 416; upon point, see, also, Chipman v. Tucker, 38 Wis. 43; Cline v. Guthrie, 42 Ind. 227. For the rule in regard to bank bills which were stolen before issue, although signed, see Worcester Co. Bank v. Dorchester & Milton Bank, 10 Cush. (Mass.) 488.

[166] Gale v. Miller, 54 N. Y. 536; Bayley v. Taber, 5 Mass. 286; Freeman v. Ellison, 37 Mich. 459; Woodford v. Dorwin, 3 Vt. 82; Ward v. Churn, 18 Grat. 801; Michigan Ins. Co. v. Leavenworth, 30 Vt. 11.

[167] Eastman v. Shaw, 65 N. Y. 527, 528.

[168] Cox v. Troy, 5 Barn. & Ald. 474. In this case a bill was presented to the defendant as drawee. After a time the one presenting the bill obtained it from him, and in the meantime words indicative of acceptance had been written upon the instrument, either by the drawee, or by his authority, which had been then erased. It was held that there was no complete acceptance. "It is not the mere act of writing on the bill, but the communication of what is so written, that binds the acceptor." Bayley, J. (concurring).

[169] Catlin v. Gunter, 11 N. Y. 368; Cowing v. Altman, 71 N. Y. 435, 79 N. Y. 167; Kinzie v. Farmers' & Mechanics' Bank, 2 Doug. (Mich.) 105; Vinton v. Peck, 14 Mich. 287.

minds of both parties must concur. This is the law laid down [170] in a case where the question was whether a check for $10,000 in gold left upon a clerk's desk, unknown to him, and without his consciously accepting it, was a delivery of it, and the court said it was not. And in a case where [171] it was the intention to deliver the instrument left in escrow on the 1st of May, but on April 30th the transferer died, it was held that there could have been no actual delivery nor intention to deliver the instrument. The necessary elements to a delivery were wanting. There was no mutual intention of both parties at the time of the act to give and receive title. One party may have intended such legal act, but such intention on his part does not make the delivery complete. As long as the other party had no such intention, there was no meeting of the minds, and therefore no contract. The time of delivery is the time at which, in the view of the law, mind so meets mind that the legal tie is effected. And legal delivery once made, in the absence of fraud or any other cause which in law destroys and nullifies a contract tie, the contract cannot be revoked, because the legal estate is then, once for all, established. The outward and visible indication of delivery is possession, because, in nine cases out of ten, where a man holds paper he has a right to hold it. And the courts have confirmed this business view accordingly, declaring that, when a bill or note is found in the hands of a payee or person claiming it, it will be presumed that it was legally delivered to him, and was in fact his.[172] But this presumption, of course, like every other, is a mere rule of evidence, and may be rebutted.[173] For delivery of a negotiable instrument is, in case of dispute, a question of fact, to be determined, subject to the presumption above mentioned, by reference to surrounding circumstances. Negotiable instruments differ in this respect from deeds and sealed instruments, which if delivered to the grantee or person entitled to take under them, become

[170] Kinne v. Ford, 52 Barb. 196, affirmed 43 N. Y. 587.

[171] Artcher v. Whalen, 1 Wend. 179.

[172] Griswold v. Davis, 31 Vt. 390; Russell v. Whipple, 2 Cow. 536; Peets v. Bratt, 6 Barb. 662; Chappell v. Bissell, 10 How. Prac. 274; Marshall v. Rockwood, 12 How. Prac. 452; Keteltas v. Myers, 19 N. Y. 231; Cordier v. Thompson, 8 Daly, 172.

[173] Scaife v. Byrd, 39 Ark. 568; Chandler v. Temple, 4 Cush. 285; Rhine v. Robinson, 27 Pa. St. 30; Roberts v. Jackson, 1 Wend. 478.

absolute, whatever the intention of the parties may have been.[174] The possession of negotiable instruments and all other instruments not under seal may be transferred to the party to whom, upon their face, they are made payable, or who is, by their terms, entitled to some interest or benefit under them, in fact, but not in law, or by analogy to deed upon an escrow, or upon a condition, the performance of which is necessary in order to perfect the title of the holder, and to enable him to enforce the contract.[175] With unsealed instruments, where the presumption of delivery has been rebutted, so far as the immediate parties are concerned, there must be given evidence that the possession of the instrument was acquired either by or under the authority of the party drawing, accepting, or indorsing it.[176] Thus, for example, where a banker indorsed a note, and put it in an envelope with his papers, at the same time making entries in his books, on his bankruptcy these facts were deemed sufficient evidence of an intention to deliver to vest title as against the assignee.[177] But where the holder of a bill specially indorsed it, and died before delivering it, it was held, his executor, finding it among his papers, could not consummate the contract by handing it to the indorsee, because the evidence of the contracting mind was lacking.[178] So, also, such acts as receiving executed notes, and retaining them, objecting only to their form,[179] or depositing executed notes in the post office, properly addressed,[180] or obtaining a duplicate bill, instead of one already lost, and treating it as an original, are construed as showing intention on the part of the person bound to obligate himself by treating the transfer at the

[174] Arnold v. Patrick, 6 Paige, 310; Worrall v. Munn, 5 N. Y. 229.

[175] Miller v. Gamble, 4 Barb. 146; Seymour v. Cowing, 4 Abb. Dec. 200.

[176] Bromage v. Lloyd, 1 Exch. 32; In re Richards, 36 Ch. Div. 541.

[177] Williams v. Galt, 95 Ill. 172.

[178] Bromage v. Lloyd, 1 Exch. 32. This action was in assumpsit on a note in writing, made by defendants, indorsed to the plaintiffs by the payee, and, after the death of the latter, delivered to the plaintiffs by the payee's executrix, without her indorsement. It was held that those to whom the note was so delivered had no right to sue upon it, for a "transfer" was not effected thereby, but see Giddings, where this case is distinguished.

[179] Bodley v. Higgins, 73 Ill. 375.

[180] Rex v. Lambton, 5 Price, 428; Kirkman v. Bank of America, 2 Cold. 397.

time it was made as a delivery. As we shall see later, if the instrument be in the hands of a bona fide holder, a valid delivery of it by all parties who are prior holders, so as to make them liable to him, is presumed.

Delivery also may be upon conditions, by which is meant that the possession of an instrument may be shown to have been acquired by the holder for a special purpose only, and that the delivery was not made to him for the purpose of transferring the title absolutely.[181] Deliveries upon conditions are of two classes: delivery as an escrow, and delivery to the other party to the instrument upon a condition. An escrow is defined[182] as a delivery to a third person, made to await some affirmative action on the part of the other party before he is entitled to the absolute delivery of the instrument, as distinguished from the affirmative action of the party who delivers the instrument in escrow. The authorities agree that a delivery in escrow has two elements: It must be to some person not ultimately entitled to receive it; and the delivery must take effect and the title to the instrument pass the instant the condition of the escrow is fulfilled, even though the depositary has not formally delivered it to the person entitled to the possession.[183] In these respects it is like the escrow of a deed, from the analogy of which it is in fact drawn. There are, however, these distinctions: A deed once delivered to be held in escrow by a third party, and wrongly passed on by him, is subject to defenses, even in the hands of a purchaser for value without notice, a negotiable instrument is not.[184] A deed being delivered conditionally to the obligee, parol evidence that it was conditional is admissible. A negotiable instrument may be delivered conditionally for a special purpose, and the

[181] Bell v. Ingestre, 12 Adol. & E. (N. S.) 319. In this case one Edwards, having drawn bills and procured acceptance by defendant, indorsed the bills, and sent them to the plaintiff, with which he was to take up overdue bills. It was stipulated as an express condition that such overdue bills should be returned to him. It was held that the indorsement was incomplete until the condition precedent had been fulfilled by the return of the overdue bills. Benton v. Martin, 52 N. Y. 574.

[182] Worth v. Case, 42 N. Y. 367.

[183] Edw. Bills & N. § 243; Daniel, Neg. Inst. 68, and cases cited; Earl v Peck, 64 N. Y. 596.

[184] Daniel, Neg. Inst. § 68.

relations between the person who so delivers it and the person to whom it is delivered are substantially those of principal and agent or principal and bailee.[185]

A delivery upon a condition is where the instrument is delivered to the payee, to be held by him pending some future event. It is explained in Juilliard v. Chaffee.[186] There Judge Danforth collates the authorities, and deduces the rule that a party sued by his promisee may always show that the instrument was delivered to the payee to take effect only on the happening of some future event, or that its design and object were different from the effect of its language if taken alone.[187] In that case, as the note did not indicate all the agreement, it was held the full purpose of its execution might be shown. So in Benton v. Martin,[188] the law was laid down that conditions might be affixed to the delivery of a note in the hands of a payee, which, as between the immediate parties, would be binding, and a defense. This does not apply to the bona fide holder.[189]

DATE.

38. A date in a bill or note, is not necessary to its validity.

The date of an instrument is not so necessary to it in law, that its absence avoids the instrument. It is not an essential characteristic of the instrument, as other qualities are characteristic of the instrument or of its negotiability. For this reason the date may be supplied by parol,[190] the date of delivery being the day of date; or it may be antedated or postdated,[191] or, if the date be left blank,

[185] Couch v. Meeker, 2 Conn. 302; Prutsman v. Baker, 30 Wis. 644.

[186] 92 N. Y. 529.

[187] Seymour v. Cowing, *40 N. Y. 532; Eastman v. Shaw, 65 N. Y. 522; Denton v. Peters, L. R. 5 Q. B. 475; Blossom v. Griffin, 13 N. Y. 569; Hutchins v. Hebbard, 34 N. Y. 24; Barker v. Bradley, 42 N. Y. 316; Grierson v. Mason, 60 N. Y. 394; Chapin v. Dobson, 78 N. Y. 75; Crosman v. Feller, 17 Pick. 171.

[188] 52 N. Y. 570.

[189] See § 93 et seq., post. Note, also, Bookstaver v. Jayne, 60 N. Y. 146.

[190] Cowing v. Altman, 71 N. Y. 441; Davis v. Jones, 25 Law J. C. P. 91.

[191] Frazier v. Trow's Printing & Bookbinding Co., 24 Hun, 281; Gray v. Wood, 2 Har. & J. 328; McSharran v. Neeley, 91 Pa. St. 17.

all parties are deemed to consent that the holder may fill up the blank with a date.[192] Legally speaking, the chief importance of a date is that it is presumptive evidence of the time of its actual execution, a presumption, however, which may be contradicted by parol evidence.[193] Likewise the place of date is supposed to be contemplated by the parties as the place of payment,[194] because, in the absence of all other guides to any information on this point, the courts turn to the instrument itself, and say the place of date is probably the place of residence of the parties, and it is reasonable to suppose that the parties contemplated the place of their residence as the place where the instrument was to be paid. It becomes important sometimes in determining whether the instrument is a foreign or inland bill or note, and where presentment and demand are to be made, or where notices of dishonor are to be sent, and questions of that character.[195] These remarks are to be understood with some limitations. The date of a completed instrument cannot be changed unless by mutual consent without avoiding it.[196] Neither must it be understood that dating a note at a particular place makes that place the one at which payment should be demanded. It does not.[197] It merely is a presumption to guide the court. And, lastly, in practical affairs an instrument without date will not circulate, because neither banks nor merchants will dis-

[192] Knisely v. Sampson, 100 Ill. 574.

[193] Germania Bank v. Distler, 4 Hun, 633, affirmed in 64 N. Y. 642; Drake v. Rogers, 32 Me. 524; Brewster v. McCardell, 8 Wend. 479; Mitchell v. Culver, 7 Cow. 336.

[194] The dating of a promissory note is prima facie evidence of the place of payment, as it is presumptive evidence that the maker resides at the place of date. Where the maker is known to have a residence which is not changed when the note is payable, a regular demand must be made, regardless of the place of date. Taylor v. Snyder, 3 Denio, 145; see, also, Bank of Orleans v. Whittemore, 12 Gray, 469. As to the presumption raised by the date as to the maker's residence, see Smith v. Philbrick, 10 Gray, 252; Demond v. Burnham, 133 Mass. 339.

[195] Stewart v. Eden, 2 Caines, 121.

[196] See § 107, post.

[197] Anderson v. Drake, 14 Johns. 114. It is held in this case that where a note is not made payable at a particular place, and the owner has a known and permanent residence within the state, the holder is bound to make a demand at such residence in order to charge the indorser. Who-

count it. The date, in most instances, determines when the instrument is to be paid. And unless it has a date, or one is agreed upon and inserted, it is impracticable as a circulating medium.

VALUE RECEIVED.

39. Value received is not necessary to be expressed in a negotiable instrument. It means:

(a) In a note, value received by the maker of the payee.

(b) In a bill before acceptance, value received by drawer of the payee.

(c) In a bill after acceptance, value received by acceptor of the drawer.

The expression "value received" is an acknowledgment of the receipt of a consideration sufficient prima facie to support the contract, and make it a binding promise for the payment of money. It raises the various questions relating to consideration, which, so far as they pertain to the circulation of the instrument, are commented upon hereafter.[198] In itself, as appears from the principal statement, with bills it means that a consideration has been received by the drawer of the payee, or by the acceptor of the drawer, according as the bill has or has not been accepted.[199] With notes it implies a consideration received by the maker.[200] Indorsers, from the mere fact of their indorsement, are deemed to have received a consideration, each indorser from his immediate indorsee.[201] And thus the instrument in its circulation bears upon itself prima facie proof of a consideration received by any of the parties against whom it is sought to be enforced. The student must, however, note that, although these words are well-nigh universal in negotiable bills

ever takes such note is presumed to have made inquiry for the residence of the maker in order to know where to demand payment.

[198] See post, § 112 et seq.

[199] Grant v. Da Costa, 3 Maule & S. 351; Benjamin v. Tillman, 2 McLean, 213, Fed Cas. No. 1,304; Highmore v. Primrose, 5 Maule & S. 65; Thurman v. Van Brunt, 19 Barb. 409.

[200] Clayton v. Gosling, 5 Barn. & C. 361, 8 Dowl. & R. 110.

[201] Edw. Neg. Inst. § 439; Chit. Bills, 69; Story, Prom. Notes, 7, 81.

and notes, they are in no wise necessary to them.[202] Their omission is unimportant, because the negotiable instrument itself imports a consideration. A mere production of the instrument on a trial is prima facie proof of the fact that it was given for a sufficient consideration.[203] The courts of New York in a late decision [204] have declared that this rule applies to certain classes of non-negotiable promissory notes, or at least to that class which import an absolute promise to pay money, but without words of negotiability. It is hard to say what effect this decision will have upon the rule that in case of a non-negotiable instrument, unless a consideration appeared upon the face of the instrument, and prima facie evidence was thus created by an admission upon the instrument itself, a consideration must be proved.[205] But it will perhaps be the case that, except in absolute promises for the payment of money, the latter rule will still prevail.

DAYS OF GRACE.

40. Days of grace are days added to the nominal time of payment of all bills or notes except those impliedly or expressly payable on demand, and are computed by excluding the day of date and including the day of payment.

[202] Underhill v. Phillips, 10 Hun, 591; Arnold v. Sprague, 34 Vt. 402; People v. McDermott, 8 Cal. 288; Jennison v. Stafford, 1 Cush. 168; Dean v. Carruth, 108 Mass. 242. This case holds that in an action on a promissory note the plaintiff sustains the burden of proof by producing the note and proving its execution. It is evidence under the hand of the promisor of a contract made upon a good consideration, even if the words "value received" are omitted. Townsend v. Derby, 3 Metc. (Mass.) 363; Hatch v. Trayes, 11 Adol. & E. 702.

[203] Underhill v. Phillips, 10 Hun, 591; Kimball v. Huntingdon, 10 Wend. 675; Townsend v. Derby, 3 Metc. (Mass.) 363.

[204] Carnwright v. Gray, 27 N. E. 835, 127 N. Y. 92. See, also, Carver v. Hayes, 47 Me. 257; Franklin v. March, 6 N. H. 364. Here the action was upon this instrument: "Good to R. C. or order for $30, borrowed money." And it was held that in this case the note "shows that it is founded upon a sufficient consideration, it purporting on its face to have been given for money borrowed; and 'good to R. C. or order' is equivalent to a promise to pay R. C. or order."

[205] Averett v. Booker, 15 Grat. 169; Atkinson v. Manks, 1 Cow. 691; Bilderback v. Burlingame, 27 Ill. 338; Josselyn v. Lacier, 10 Mod. 294, 317.

Originally, days of grace were days allowed the drawee or acceptor of a foreign bill by the holder to enable him to provide funds to meet the bill. They were days obtained by the drawee or acceptor through the grace of the holder. This was first custom, then law. These days are now extended to cases of negotiable inland bills and promissory notes as well as the foreign bills to which at first the custom was only appended. It extends under the common-law rules to all negotiable bills of exchange or notes,[206] except those wherein the instrument is made payable on demand, or without specification of time, in which case on demand without grace is understood, or wherein grace is expressly waived. These common-law provisions are very generally modified by the statutes of various states. In some states, too, promissory notes are not entitled to grace. The doctrine is that they, not being negotiable in themselves, but being made so by statute, are not placed upon the footing of bills of exchange, unless the statute expressly gives them all the privileges of negotiability. But where the statute does place notes on the footing of bills of exchange, then grace follows as a matter of course. For the same reason non-negotiable instruments are not entitled to grace.

The number of days allowed as grace is generally three,[207] and is computed by adding them to the days, or months reckoned as calendar months, stipulated in the instrument.[208] The day of date is

[206] In the case of Oridge v. Sherborne, which was an action on a promissory note payable in installments, it was held that the maker was entitled to the usual days of grace as each installment fell due. 11 Mees. & W. 374. And see Perkins v. Franklin Bank, 21 Pick. (Mass.) 483; Mechanics' Bank v. Merchants' Bank, 6 Metc. (Mass.) 13; Wood v. Corl, 4 Metc. (Mass.) 203. As to notes payable in installments, see Coffin v. Loring, 5 Allen (Mass.) 153. Checks are not entitled to days of grace. Andrew v. Blachly, 11 Ohio St. 89, Johns. Cas. Bills & N. 50.

[207] Daniel Neg. Inst. § 622. Demand of payment on negotiable bills and notes cannot be legally made until the third day of grace. Griffin v. Goff, 12 Johns. (N. Y.) 423, Johns. Cas. Bills & N. 49. In the case of Lenox v. Roberts it was held that demand should be made on the third day, and notice of the maker's default be posted in time to go by the mail of the day after. Lenox v. Roberts, 2 Wheat. 373; Bank of Alexandria v. Swann, 9 Pet. 33.

[208] Thomas v. Shoemaker, 6 Watts & S. 179; McMurchy v. Robinson, 10 Ohio, 496.

excluded from the calculation and the day of payment included.[209] This computation by months does not take into account the varying length of the month. The time reckoned in months may be longer or shorter, according as there are more or less days in the month. It also does not take into account the fact that the last day of grace happens upon a non-business day. In this last event, though in case of all non-commercial instruments the time which must expire before suit can be brought against the debtor is extended to the next succeeding business day,[210] yet with negotiable instruments, under the common law, grace is not extended in this way. With them the days of grace end on the next preceding business day, because the debtor cannot compel the creditor to extend the indulgence which a custom of doubtful advantage has already attached to the paper.[211] This rule has been wisely modified by the statutes of many jurisdictions, where the day of payment has been declared to be the next succeeding secular or business day.[212] But, in the absence of any express statute, it is generally understood that the common-law rule would prevail. It is to be observed that in New York days of grace have been abolished by statute.[213]

[209] Roehner v. Knickerbocker Life Ins. Co., 63 N. Y. 160; Bellasis v. Hester, 1 Ld. Raym. 280; Campbell v. French, 6 Term R. 212; Hartford Bank v. Barry, 17 Mass. 24; Ripley v. Greenleaf, 2 Vt. 129; Avery v. Stewart, 2 Conn. 69, Johns. Cas. Bills & N. 57; Henry v. Jones, 8 Mass. 453; Pearson v. Stoddard, 9 Gray (Mass.) 199; Wentworth v. Clap, 11 Mass. 87.

[210] Salter v. Burt, 20 Wend. 205. In this case a postdated check was payable on the day of its date, without days of grace. As it fell due on Sunday, the question arose as to whether payment should be made on the previous Saturday or the Monday following. The following is a portion of the court's opinion: "When there are no days of grace, and the time for payment or performance specified * * * falls on Sunday, the debtor may, I think, discharge his obligation on the following Monday." A bill or note falling due on Sunday, without days of grace, is payable on the following day. Hirshfield v. Ft. Worth Nat. Bank, 83 Tex. 452, 18 S. W. 743; Id., Johns. Cas. Bills & N. 53; Barrett v. Allen, 10 Ohio, 426; Avery v. Stewart, 2 Conn. 69.

[211] Bussard v. Levering, 6 Wheat. 121; Reed v. Wilson, 41 N. J. Law, 29; Kuntz v. Temple, 48 Mo. 78; Farnum v. Fowle, 12 Mass. 89; Barker v. Parker, 6 Pick. (Mass.) 80; City Bank v. Cutter, 3 Pick. (Mass.) 414.

[212] Rev. St. N. Y. pp. 2506, 2507.

[213] Sess. Laws 1894, c. 607.

CHAPTER III.

ACCEPTANCE OF BILLS OF EXCHANGE.

41. Definition.
42–45. Acceptance According to Tenor.
46. Who may Accept.
47. Delivery.
48–49. Forms and Varieties of Acceptance.
50. Implied Acceptance.
51–52. Acceptance on Separate Paper.
53. Parol Acceptance of a Bill.
54–55. Acceptance for Honor or Supra Protest.

DEFINITION.

41. An acceptance is an undertaking by the drawee to pay the bill when due.

It will perhaps help the student to understand the theory of acceptance to present it to him as a phase of the elementary theoretical notion of a contract as constituted by an offer and acceptance.

The acceptance is the assent to the proposition contained in the draft, which on its part is an offer, and which offer and assent, taken together, constitute a contract right or relation. In its practical aspect as a contract, it obviates the transfer of cash by means of credit. In the illustration under § 10, C owed A. A, we may assume, says to B, "Give me cash for my debt, and treat the debt itself as cash." B agrees to this proposition, and A gives, as an evidence of the transfer of the debt to B, the ordinary draft, making him the payee. B then turns over this evidence of indebtedness, and the right of action along with it, to D, and D, on his part, to E. E now comes with the paper to C. At this point the relation of the parties is as follows: The right A had to the debt of C is now held by E in the shape of a piece of commercial paper, which E is about to present to C. A is liable to B for the £1,000 B paid A; B, on his part, is liable to D for the £1,000 paid by D to B; and D to E. As yet C owes nothing to B, D, or E, and he only owes A for

the debt he owed him in the first place. The paper in E's hands has been passing from hand to hand, and used for the payment of debts, and accepted as such upon the supposed solvency of each person who has held and indorsed it. C now says, "Yes, I will pay this £1,000"; and evidences his assent by writing on the bill "Accepted" over his own signature. At that moment he enters into a contract relation with the holder of the bill, and also with the various indorsers, that he will pay the bill.[1] In other words, C promises B, D, and E, and each of them severally, that he will pay £1,000 to the holder. Thus, B, D, and E may look to either C or A for the £1,000 they have expended, but the condition implied is that B, D, and E, inasmuch as they have paid A for C's debt, will look to C to pay first, and, if C does not pay, then they will look to A. This is the practical aspect of the theory of acceptance.

It follows that the drawee, until acceptance, is a stranger to the bill.[2] In Swope v. Ross the drawee, who had not accepted a bill, discounted it before maturity, and the argument was that, in thus cashing it, he had paid it. But the court said it was neither acceptance nor was it payment, unless such was the express intention of the parties. So that if a drawee receives and discounts a bill for the drawer, and then discounts it away, the drawer, and not the acceptor, is the person who must ultimately pay the bill.[3] But the drawee, upon acceptance, in the order of liability, becomes the principal debtor. He is precisely like the maker of a promissory note. This means that all parties may look to him to pay the instrument; that no demand need be made of him; and that notice of dishonor to him is unnecessary,—all matters of moment in business affairs.[4]

With these shifts of liability on the part of the drawee before and

[1] As to an acceptance being irrevocable, see Trent Tile Co. v. Ft. Dearborn Nat. Bank of Chicago, 54 N. J. Law, 33, 23 Atl. 423, Johns. Cas. Bills & N. 87.

[2] Swope v. Ross, 40 Pa. St. 186; Chapman v. White, 6 N. Y. 412; Bellamy v. Majoribanks, 8 Eng. Law & Eq. 523; Mandeville v. Welch, 5 Wheat. 277; Attenborough v. Mackenzie, 36 Eng. Law & Eq. 562; Desha v. Stewart, 6 Ala. 852; Tyler v. Gould, 48 N. Y. 682; Bullard v. Randall, 1 Gray (Mass.) 605; Tiernan v. Jackson, 5 Pet. 580.

[3] Chapman v. White, 6 N. Y. 412; Winter v. Drury, 5 N. Y. 525; Duncan v. Berlin, 60 N. Y. 151.

[4] Wallace v. McConnell, 13 Pet. 136, which contains cases on this point; Foden v. Sharp, 4 Johns. 183; Wolcott v. Van Santvoord, 17 Johns. 247; Rus-

after acceptance, there is a corresponding change of liability on the part of the drawer. If the drawee refuses to accept, after having promised so to do, the drawer may either sue him directly upon the promise for all loss occasioned,[5] or he may fall back upon their original relation for his remedy. If it was debt, as in the case we put, he must sue on the indebtedness. If the drawer had deposited funds, he must demand them, and, on refusal, sue in tort or for conversion. In such a case, too, as we have already shown, all prior parties must look to the drawer to be repaid the moneys they have expended on taking the bill. The drawer remains, at all times, the principal debtor on the bill. On the other hand, upon acceptance the drawer is relieved from primary liability upon the bill, and stands as to the other parties to the instrument in a relation somewhat akin to a guarantor, or, as it is accurately put, in the position of first indorser. He is liable to pay the bill if the acceptor does not. A glance at the example will show the fairness of this. A received from B cash for a debt C promised to pay; B received cash from D; and D from E. If C fails in his promise, the cash received should be refunded in the order it was paid. This would leave the controversy as it ought to be between C and A.

So far as classification is concerned, acceptances may be classified according to their essential elements, and according to their technical form. In their essential elments, acceptances are analogous to the acceptances of propositions in ordinary contract law. As with the acceptance of the offer in the ordinary contract,[6] the acceptance of the bill of exchange must, in every respect, meet and correspond with the terms contained in the bill itself. It must neither fall within nor go beyond these terms, but must exactly meet them at all points.[7] In technical phrase, it must be according to

sell v. Phillips, 14 Q. B. 891; Jarvis v. Wilson, 46 Conn. 90; Cox v. National Bank, 100 U. S. 712.

[5] Ilsley v. Jones, 12 Gray (Mass.) 260; Riggs v. Lindsay, 7 Cranch, 500; Van Wart v. Woolley, 5 Dow & R. 374; Allen v. Suydam, 20 Wend. 321; Barney v. Newcomb, 9 Cush. (Mass.) 46.

[6] Potts v. Whitehead, 23 N. J. Eq. 512; Ellason v. Henshaw, 4 Wheat. 225; Eads v. City of Carondelet, 42 Mo. 113; Corcoran v. White, 117 Ill. 118, 7 N. E. 525; Siebold v. Davis, 67 Iowa, 560, 25 N. W. 778; Northwestern Iron Co. v. Meade, 21 Wis. 474; Clark, Cont. p. 36.

[7] See post, § 42.

the tenor of the bill. Again, as with the ordinary contract,[8] an offer made to one person cannot be accepted by another. The drawee, or some person who, in view of law, is the same as the drawee, must be the acceptor.[9] And like the ordinary contract, also, the legal obligation is not created until the delivery of the instrument. In their technical form, acceptances may be express or constructive, oral or written.[10] Express acceptances are those expressed in the words of the drawee; constructive, those implied from his acts. Written acceptances are assents written either upon the bill itself, or upon a piece of paper separate from the bill. The common, general principles governing the detail of form of written acceptances are that it need not be dated. It may be accepted by the drawee in any name he chooses to adopt.[11] It may be placed upon a bill before it has been signed by the drawer, or while otherwise incomplete,[12] or after it is overdue, or after dishonor. With these general observations as to the nature and form of acceptances, let us turn and examine more carefully their specific details.

ACCEPTANCE ACCORDING TO TENOR.

42. The acceptance must be absolute and according to the tenor of the bill to bind all the parties to it.

43. THE TENOR OF THE BILL—Is the request in the bill to pay the money at the time and place and in the manner mentioned in it. A change in the acceptance in

[8] Price v. Easton, 4 Barn. & Adol. 433; Leake, Cont. 481; Tuttle v. Catlin, 1 D. Chip. 366; Rossman v. Townsend, 17 Wis. 95; Ross v. Milne, 12 Leigh, 204; Ellison v. Jackson Water Co., 12 Cal. 542; Seaman v. Whitney, 24 Wend. 260; Fugure v. Mutual Soc. of St. Joseph, 46 Vt. 362; Haskett v. Flint, 5 Blackf. 69; Clark, Cont. p. 508.

[9] See post, § 46.

[10] Sturges v. Fourth Nat. Bank, 75 Ill. 595, Johns. Cas. Bills & N. 69; Dull v. Bricker, 76 Pa. St. 255; Averill v. Wood, 78 Mich. 342, 44 N. W. 381; Peterson v. Hubbard, 28 Mich. 197; Grant v. Shaw, 16 Mass. 341; Wells v. Brigham, 6 Cush. (Mass.) 6.

[11] Lindus v. Bradwell, 5 C. B. 591; Alabama Coal Min. Co. v. Brainard, 35 Ala. 476; Nicholls v. Diamond, 9 Exch. 154.

[12] London & Southwestern Bank v. Wentworth, 5 Exch. Div. 96; Harvey v. Cane, 34 Law T. (N. S.) 64.

any one of these respects renders the acceptance "qualified."

44. The payment of the bill by the acceptor may be made dependent on a condition. It is then called "conditional" acceptance.

45. A qualified or a conditional acceptance is only valid—

(a) As to all parties subsequent to the acceptance.

(b) As to all prior parties who, upon due notice, assent.

The general principle is that, for an instrument or an act to be an acceptance, it must be according to the tenor of the bill.[18] The promise must be to pay all the money called for in the bill, for, if a bill be accepted for only part of that sum, it would result in splitting up the right of action on the bill, part being chargeable to the acceptor, and part to the drawer; it would necessitate a partial protest for non-acceptance and for non-payment; and lastly, on payment, the drawee would be entitled to demand the possession of the bill, and his possession of it would be presumptive evidence of the payment of the whole bill, though he has in fact paid only part of it. These, of course, are grave reasons against such an instrument acting as a circulating medium. So, also, equally grave business objections exist against modifying the assent to the bill,

[18] Wegersloffe v. Keene, 1 Strange, 214; Boehm v. Garcias, 1 Camp. 425, note. This was on a bill, "payable in effective and not in vals reals." The drawee offered to accept payable in vals denaros, but this was refused. It was held that the plaintiff had a right to so refuse, and that the proposed acceptance was not a sufficient acceptance of a bill drawn as was this one. The acceptance should have been general. Gibson v. Smith, 75 Ga. 34; Shackelford v. Hooker, 54 Miss. 716. In Petit v. Benson it was held that a partial acceptance would charge acceptor for such amount, but also that it might be refused and protested by the one to whom the bill is due, as to the whole amount, so as to charge the first drawer. Comb. 452. In an action upon a bill of exchange, it was held that, where the day of payment was past at the time of acceptance, an agreement to pay secundum tenorem et effectum billæ was equivalent to a general acceptance, for the reason that it was then impossible to pay as is directed in the bill. Jackson v. Pigott, 1 Ld. Raym. 364; Ford v. Angelrodt, 37 Mo. 50, Johns. Cas. Bills & N. 76; Swope v. Ross, 40 Pa. St. 186.

as to the time, place, or manner of its payment, or making its payment conditional. For if, in the illustration under § 10, the bill was a 6-months bill, and B, D, and E were indorsers upon it, and the bill were payable in Jamaica, B, D, and E, as indorsers, might make all their calculations to pay the money at that time and place if C, the acceptor, did not. It would therefore be an injustice and hardship to B, D, and E if C were to accept the bill in three months, payable at London, England, because, if C did not pay at that time and place, the holder might sue B, D, and E, who had every right to expect that they would not be called upon to pay until after the expiration of 6 months, and then at Jamaica. Thus such a rule is necessary to protect the other parties to the bill who act as sureties or guarantors. And, taking all things into consideration, it is wiser to disallow than to allow them.

But the student must not understand that such acceptances in themselves are bad. They promise to pay the bill. They create contract rights upon the consideration which would have rendered the acceptance, had it been given in the ordinary form, binding. They are contracts valid, but so inconsistent with the contracts of the indorsers acting as sureties or guarantors, that they are impracticable and hence not allowed to be enforced. Where, however, they do not prejudice the rights of the indorsers, or in other words, where the modification of the tenor of the bill is such that it either casts no hardship upon the indorser, or where the indorser or parties prior to the acceptor know of the modification and assent to it, there the reason for rejecting it as a form of acceptance ceases to exist, and so the rule is that a modified or qualified acceptance if immaterial, or if known and assented to, is a valid acceptance.[14] If it is a material alteration of the terms of the bill, and is not known

[14] In Smith v. Abbott the defendant accepted a bill to pay when the goods for which it was drawn were sold. As the plaintiff submitted, this was held good, though the plaintiff might have refused such acceptance, and have protested the bill. 2 Strange, 1152. In Walker v. Atwood a bill without a day of payment was accepted by the drawee to be paid on a certain date after it was presented. Although bills without such date when payable are due at sight, yet, by the custom of merchants, such acceptance was held good. 11 Mod. 190. Shackelford v. Hooker, 54 Miss. 716, Johns. Cas. Bills & N. 78.

and assented to, then it is invalid. If the modification is known and assented to, then the parties enter into a new contract. Parties subsequent to the modified acceptance of course enter into the contract on the basis of the acceptance as modified and are bound by it. Parties prior to it who assent, waive their right to object and create as against themselves a right in the holder akin to an estoppel. The materiality of an alteration in the tenor of the bill is well brought out in two cases, one of which was where the draft was addressed to Cobourg, and accepted payable at Port Hope, a town some miles distant; in the other, where the bill was drawn payable in New York generally, and accepted payable "at Continental Bank, New York."[15] In this last case the fixing or designating a specific place in the city to which the bill was addressed was no hardship,—no material change; while compelling an indorser to be ready at some distant place was a hardship and a material change.

There is a further distinction maintained by the authorities, which is perhaps rather of form than of substance. Where the acceptance varies the offer contained in the bill as to the time, place, or mode of payment, it is a qualified acceptance.[16] Where, however, a variation is introduced into the acceptance of the bill in the nature of a condition, the acceptance is called "conditional." In the last class of cases the plaintiff as a part of his case must show that the condition has been performed before the liability of the acceptor can be deemed to have accrued.[17] A common example of this is an acceptance to pay "when in funds,"[18] which means that when the acceptor has cash which the drawer has a right to demand and receive he will then pay the bill.[19] This manner of acceptance, as well as the qualified one, creates a new contract, and is governed by the rules and reasons we have just laid down. The holder may

[15] Niagara Dist. Bank v. Fairman & W. Mach. Tool Manuf'g Co., 31 Barb. 403; Troy City Bank v. Lanman, 19 N. Y. 477.

[16] Byles, Bills, 316; Story, Bills, § 204; Daniel, Neg. Inst. § 515.

[17] Gammon v. Schmoll, 5 Taunt. 344; Nagle v. Homer, 8 Cal. 358; Read v. Wilkinson, 2 Wash. C. C. 514, Fed. Cas. No. 11,611; Gooding v. Underwood, 89 Mich. 187, 50 N. W. 818; Ferguson v. Davis, 65 Mich. 677, 32 N. W. 892; Storer v. Logan, 9 Mass. 55.

[18] Marshall v. Clary, 44 Ga. 513.

[19] Wintermute v. Post, 24 N. J. Law, 420; Campbell v. Pettengill, 7 Greenl. (Me.) 126; Owen v. Lavine, 14 Ark. 389.

elect to reject it altogether, and at once give notice either of non-acceptance or of protest, or he may, if willing to accept the offer, give notice to prior parties, and they in turn may assent to it, and thus become bound. This is, however, not always the rule with regard to the drawer as a prior party. If, as is sometimes the case, the drawer makes a draft upon a drawee without having a right to do so, there is no more reason why the courts should release him from his contract than that they should seek to protect him by giving him notice of dishonor in case of a refusal to accept or to pay. In both cases the holder is injured by the act of the drawer, and in both cases the drawer is held bound.[20]

WHO MAY ACCEPT.

46. The only person permitted by the law merchant to be an acceptor is the person to whom the bill is addressed. Another person is liable only upon a collateral undertaking.

EXCEPTION—An acceptor for honor.

The arbitrary custom of merchants is said by the courts to be the reason of this rule. Though it is not the language of the courts, yet it so coincides with the fundamental theory of contracts that we add as an additional reason that no person other than the drawee can be acceptor, because such a person would be in a measure a stranger to the contract.[21] He is not, as appears from the face of the instrument, indebted to, nor has he funds of, the drawer. It is true, his intention may have been to signify to the parties to the bill that he was willing to pay and would pay the instrument. But he was not the person to whom the proposition or on whom the order was made. He was not a party to the contract. If the courts were to treat him as an acceptor, they would make a contract for the drawer with a party with whom, as far as it can be gathered from the bill, the drawer had no intention of contracting. This, though somewhat vaguely stated, seems to be the underlying prin-

[20] Daniel, Neg. Inst. § 511.

[21] Heenan v. Nash, 8 Minn. 407 (Gil. 363), Johns. Cas. Bills & N. 65; Raborg v. Peyton, 2 Wheat. 385.

ciple in Walker v. Bank of State of New York.[22] In that case the bill was addressed to Mr. E. C. Hamilton, of New York, and was "accepted payable at American Ex. Bank. [Signed] Empire Mills. By E. C. Hamilton, Treas." The question was whether this was an acceptance, and the court said this was an acceptance of the Empire Mills, not a party to the contract. This point is brought out more clearly in some of the English cases. In Jackson v. Hudson [23] a bill was addressed to Mr. I. Irving, and accepted, "I. Irving. Joseph Hudson." This was a case for sale of goods to Irving. Hudson accepted, by way of making the acceptance doubly sure. But Lord Ellenborough said Hudson's undertaking was a collateral one. It was meant to be a guaranty, and not an acceptance.[24] This rule is subject to exceptions, to some of which we have before called attention. We have seen that if it were clear to whom the bill is meant to be addressed, and the acceptance is made by such a person, then the acceptance is sufficient. This is based upon the case of Gray v. Milner,[26] where an instrument was addressed "Payable at No. 1 Wilmot St.," and the words "Accepted, Charles Milner," were treated as a proper acceptance, because such an address could only mean the person residing there. This rule has been followed in this country, and it is now probably the law. In addition to this exception, there are others. A draft may be accepted by some drawee other than the one named, provided in the draft there was a misnomer as to the drawee and it was accepted by the person to whom it was intended to be addressed.[27] The acceptor for honor—a branch of this subject to be discussed later on—is also a modification of this rule. Besides these instances, an agent may accept for

[22] Walker v. Bank of State of New York, 9 N. Y. (5 Seld.) 582.

[23] Jackson v. Hudson, 2 Camp. 447.

[24] Davis v. Clarke, 6 Q. B. 16. In this case the maker drew a bill of exchange payable to himself or order, and addressed also to himself, and a third party signed his initials to the word "Accepted." It was held that such third party could not be sued as an acceptor, on the ground that he was not the acceptor of a bill of exchange directed to him. See, also, May v. Kelly, 27 Ala. 497; Steele v. McKinlay, 43 Law T. (N. S.) 358.

[26] Gray v. Milner, 8 Taunt. 739.

[27] Hascall v. Life Ass'n, 5 Hun, 151.

and in the name of the principal,[28] but not in his own name, because that is his individual acceptance, and not the acceptance of the drawee.[29]

DELIVERY.

47. An acceptance is probably complete only upon delivery.

It is maintained by Professor Ames that an acceptance is complete without delivery because, as he says, the delivery of a bill or note is necessary only for the purpose of creating or transferring title.[30] The reasons for the rule adopted by this great theorist are undoubtedly those advanced by Lord Coleridge in a case where the question was whether the judge of the Norfolk county court, whose jurisdiction was apparently local and dependent upon the locus curiæ, would have jurisdiction over a case where the defendant signed an acceptance in London, England, and sent it to Norwich, Norfolk county. The court held such an action was properly brought in London, and not in Norwich, and his lordship, referring to the argument that an acceptance was like an indorsement, distinguished the acceptance from an indorsement, and said: "One purpose of an indorsement is to pass the property in the bill, and that purpose is not effected until actual or constructive delivery. But the acceptor has no property in the bill before or after acceptance. He must be supposed to receive the drawer's paper and on it write his promise without in any way altering the property in the bill. He may, indeed, before any communication to the drawer of the act done, revoke it, but his promise, unless so revoked, is complete, and takes

[28] Thom. Bills, 211.

[29] Daniel, Neg. Inst. § 487. A bill was directed to a company, and was accepted for the company by one of its members, who signed as manager. In an action on this it was claimed that such acceptance did not bind the party accepting, because he had no authority. This, however, was held not to affect his personal liability, as it was shown that he was one of those associated under the name of the company to whom the bill was directed. The bill was held not vitiated by the misrepresentation of the defendant. Owen v. Van Uster, 20 Law J. C. P. 61. To the same purpose, see Nicholls v. Diamond, 9 Exch. 154.

[30] 2 Ames, Bills & N. p. 791.

effect from the time when it is made."[81] Though this opinion thus laid down is sustained by great and venerable authority, yet it is submitted that delivery of a written contract is at all events a most conspicuous evidence on the part of the person delivering it of intention to be bound. And it should be an important factor with the acceptance, as with every other species of contract right, to determine, not whether the acceptor has in fact signed the bill, but whether he actually intended to be bound by it. With the maker's contract, for instance, so long as the maker of a note retains it in his own hands, it is a nullity. It does not become operative until it is transferred to some other person;[82] and even when once signed, and the signature is then erased, the holder of a bill or any antecedent party cannot be prejudiced by it. It must be the same thing to them whether the drawee gives it back or delivers it to him unaccepted, or whether he finds that the drawee has withdrawn his acceptance, having at one time intended to accept it, but having subsequently changed his mind. And it seems perfectly competent in cases where the fact of acceptance is uncommunicated for the drawee to erase or cancel his acceptance before he deliver the bill.[83] Where the acceptance has been communicated a different element is introduced, depending upon the question of substantial loss. The reason why an uncommunicated acceptance can be canceled before delivery is that neither the holder nor prior parties are worse off than if the holder was just about making presentment. And even if the acceptance be communicated, yet if the note be undelivered, and the holder be still in a position to make re-presentment, and to protest and to hold prior parties, the same reasons to allow cancellation prevail.[84] He has lost no right by reason of the communication of the fact of acceptance that he would have had, had his acceptance

[81] Wilde v. Sheridan, 21 Law J. Q. B. 260. See, also, Bentinck v. Dorrien, 6 East, 199. In this case a bill on the defendants was left by the plaintiff, who was indorsee. The defendants accepted, but on the next day canceled their acceptance, whereupon plaintiff protested for nonacceptance. It was held that, while such acceptance might be valid as to a third party, the plaintiff had, by protesting, precluded himself from claiming an acceptance. Thornton v. Dick, 4 Esp. 270.

[82] Gale v. Miller, 54 N. Y. 536; Dunavan v. Flynn, 118 Mass. 537.

[83] Cox v. Troy, 5 Barn. & Ald. 474.

[84] Irving Bank v. Wetherald, 36 N. Y. 335.

been refused. But if, on the other hand, the drawee retain the bill after communicating his acceptance, and for this reason loss is caused to the holder or other parties to the bill, the principles of estoppel would apply, and it is probable that the right of revocation would be denied. In this view of the case the reason is that the equitable rule that he who occasions loss must suffer for it should prevail over the rule of evidence that unconditional delivery of a written contract is the best evidence of an intention to be bound by it. And it is submitted that the reason cannot be that an acceptance once signed is binding whether such was the intention of the party or not.[85]

FORMS AND VARIETIES OF ACCEPTANCE.

48. An acceptance, if in writing, is constituted by words not putting a direct negative upon the order contained in the bill. The question is whether an intention to accept can be construed from the words.

49. An acceptance, if verbal, is constituted by any words which evidence such intention clearly and unequivocally, if they be addressed to the drawer or holder, and he waive his right to a written acceptance. An acceptance may also be implied from conduct evidencing such intention.

The foregoing principal text shows the form and varieties of acceptances. They are acceptances expressed in written or spoken words, as contrasted with each other and also with acceptances implied from merely the conduct of the drawee. Another variety of the general class is caused by its being written on a separate piece of paper; and a third, by its being issued as a written, spoken, and implied acceptance before or after the issuing of the bill. It is our purpose to first show the underlying theory of an acceptance, and then to show the forms and general principles required for an acceptance by the law merchant.

As has been said, the acceptance is the assent of the drawee to

[85] Smith v. McClure, 5 East, 476; Dunavan v. Flynn, 118 Mass. 537.

the proposition of the drawer. The question, then, is, what, under the law merchant, will be deemed an evidence of such assent.[36] There are three general classes based upon the divisions we have given above: Acceptances in writing, acceptances by parol, and acceptances implied from conduct.

If in writing, the courts, according to Judge Cowen,[37] go to the length of saying that any form of words which do not in themselves negative the request of the bill shall be treated as a valid acceptance of it.[38] Under the common law, neither the word "Accepted" nor the signature of the acceptor is necessary. The unsigned words "Seen," [39] "Presented," [40] "Honored," [41] or merely the name of the drawee,[42] or "I will pay this bill," [43] are sufficient acceptances, and evidence the fact merely that the drawee has seen the bill, and does not dissent from it. In many jurisdictions written and signed acceptances are required, meaning, according to the interpretation of numerous cases, that an acceptance is sufficient if it be the name of the acceptor alone, which complies with the regulation that the

[36] In re Armstrong, 41 Fed. 381; Van Staphorst v. Pearce, 4 Mass. 258; Peck v. Cochran, 7 Pick. (Mass.) 34.

[37] Spear v. Pratt, 2 Hill, 582.

[38] Where a bill was drawn on the defendant, and he wrote across it: "Accepted. Payable at Messrs. Stevens & Co.,"—but failed to sign, it was held to amount to an acceptance. The court, in summing up, said that it was of opinion that the writing might be valid in law, though unsigned, but that whether it was intended so to operate in its unfinished condition was a question for the jury. Dufaur v. Oxenden, 1 Moody & R. 90. In an action of assumpsit by the indorsee against the acceptor, it was proved that the defendant had given a stamp, with his acceptance in blank to the drawer, and authorized him to draw at a certain date for a specific amount. It was held that there was an actual acceptance in writing, with express authority to fill in the bill in a particular manner. Leslie v. Hastings, 1 Moody & R. 119.

[39] Barnet v. Smith, 10 Fost. (N. H.) 256.

[40] Pars. Bills & N. 282.

[41] Anson, Cont. 401.

[42] The drawee of a bill of exchange wrote his name across the face of the bill, without words of acceptance. This was held to be such an acceptance as to bind him, even though the statutory requirements were that the acceptance should be in writing, and signed. Spear v. Pratt, 2 Hill (N. Y.) 582.

[43] Ward v. Allen, 2 Metc. (Mass.) 53.

acceptance shall be in writing and be signed.[44] And every holder of a bill, presenting the same for acceptance, may require the acceptance to be written on the bill. A refusal to comply shall be deemed a refusal to accept, and the bill may be protested.

In jurisdictions where acceptances are not required to be in writing, or the statutes do not otherwise modify the common law, parol acceptances, if assented to by the holder, are permitted.[45] A parol acceptance is any form of words used by the drawee which by reasonable intendment can be made to signify that he honors the bill. There are some limitations to this rule. These words are to be addressed to the drawer or holder. They must be assented to by the holder.[46] They must relate to an existing bill, for, if they pertain to a future bill, they will not be deemed an acceptance. They must be unequivocal, for, if they are equivocal, they will not be deemed an acceptance. In such expressions as "Your bill shall have attention," "I will pay the bill, but I cannot now," "I will give you a bill at three months," [47] there is no distinct, definite promise or agreement

[44] Alabama, Code, § 2101; Arizona, Comp. Laws, §§ 3469–3471; California, 1 Hitt. Code, § 8193; Connecticut, Laws 1893, c. 95; Idaho, Rev. Laws, p. 653; Kansas, Comp. Laws, c. 14, § 8; Maine, Rev. St. c. 32, § 10; Michigan, 1 Comp. Laws, p. 516, § 7; Minnesota, Gen. St. p. 316, § 13; Mississippi, Code, § 1133; Nevada, 1 Comp. Laws, c. 5, § 6; New York, Rev. St. p. 2490, § 6; Oregon, Gen. Laws, p. 718, § 7; Pennsylvania, Pub. Laws 1881, p. 17; Wisconsin, Rev. St. 1681.

[45] Scudder v. Union Nat. Bank, 91 U. S. 406; Stockwell v. Bramble, 3 Ind. 428; Mason v. Dousay, 35 Ill. 424; Sturges v. Fourth Nat. Bank, 75 Ill. 595; St. Louis Nat. Stockyards v. O'Reilly, 85 Ill. 546; Exchange Bank v. Rice, 98 Mass. 288. In this case, J. P. Hill drew a bill to order of J. Pitman & Co. "against 12 bales of cotton." This, being indorsed to plaintiffs, they presented for acceptance, which was refused. In a letter to Hill, defendants explained that this was because no bill of lading had been received, but on receipt of it the bill would be accepted. Having procured this letter and duplicate bill of lading, plaintiffs again presented, and then protested for non-acceptance, and finally for non-payment. It was held that the letter to Hill, having been written after plaintiffs took the bill of exchange, which was not addressed to them, did not make defendants liable as acceptors. Sproat v. Matthews, 1 Term R. 182; Arnold v. Sprague, 34 Vt. 402; Miller v. Neihaus, 51 Ind. 401; Pierce v. Kittredge, 115 Mass. 374.

[46] Story, Bills, §§ 242–247; Edw. Bills & N. §§ 416, 417; Bayley, Bills & N. c. 6, § 109; Johnson v. Collings, 1 East, 98.

[47] Reynolds v. Peto, 11 Exch. 418.

to pay the bill. They were consequently deemed by the court too uncertain to be treated as acceptances. The point to be determined is whether, by a reasonable construction, the words used will show that the acceptor recognized an immediate obligation on his part to the drawer upon him, assented to it, and declared himself bound to the payment of it as evidenced by the bill.[48] Keeping in mind the expressions we have quoted, contrast them with such expressions as those used by the drawee in a case where a foreign bill had been protested for nonacceptance, and the drawee said, "If the bill comes back, I will pay it," [49] or, in another case, where the drawee said, "Leave your bill with me, and I will accept," [50] both of which expressions were held to be sufficient acceptances. In these last expressions there was a distinct promise to honor the bill. It is probably the case that, when verbal acceptances are permitted, they will at the present day be construed with extreme strictness. It is undoubtedly the common law that they are allowable.[51] But it is also equally true that they are not in accord with the true theory of negotiability. A bill of exchange should have all its in-

[48] In Powell v. Jones, the bill was given to the defendant for acceptance by the clerk of the plaintiff. On calling for it afterwards the defendant said: "There is your bill. It is all right." It was held that these words did not amount to an acceptance, as they did not evidence the defendant's intention to bind himself to pay at all events. 1 Esp. 17. The words: "If you will send it to the counting-house again, I will give directions for its being accepted," were held to constitute only a conditional promise, and not to operate as an acceptance until the bill was actually sent back. Anderson v. Hick, 3 Camp. 179. Where the defendants agreed to accept upon the happening of some contingency, it was held that such conditional acceptance could not be declared on as an absolute acceptance, when such contingency had actually happened. Langston v. Corney, 4 Camp. 176.

[49] Cox v. Coleman, Chit. Bills, 274.

[50] 1 Chit. Bills, p. 12.

[51] In Spaulding v. Andrews, it was shown that shortly after a bill was drawn, the payee, who was the holder, presented it to the drawee, and received verbal assurance that it would be paid on maturity. It was held there was an acceptance good as to a third party who obtained the bill after such parol acceptance, though he did not know of the acceptance, and that it made no difference as to when a parol acceptance was made, if after the bill was drawn. 48 Pa. 411. As to the sufficiency of a parol acceptance as affected by the statute 3 & 4 Anne, c. 9, see Lumley v. Palmer, 2 Strange, 1000.

dicia upon its face. And this rule, with every other that contravenes it, complicates business operations, and clogs the circulation of an instrument as a medium of payment.[52]

SAME—IMPLIED ACCEPTANCE.

50. AN IMPLIED ACCEPTANCE—Is any act which clearly indicates an intention to comply with the request of the drawer, or any conduct of the drawee from which the holder is justified in drawing the conclusion that the drawee intended to accept the bill, and intended to be so understood.[53]

An implied acceptance is equally open to the objections we have made to the verbal acceptance, though the doctrine of constructive or implied acceptance is in itself consistent with justice. Its limits are not exactly defined. It arises where the bill is detained for a long time, contrary to the usage of the parties, or withheld upon the understanding that the drawee is to accept.[54] Where, however, the detention is not contrary to the usual dealings between the parties, or is due to the fact that the holder failed to call for it, the doctrine does not apply.[55] Destruction of the bill, when the act is tortious because it amounts to an appropriation or conversion of the bill, is also an implied acceptance.[56] The reason of this theory is that

[52] In the case of Johnson v. Collings, the bill on which the action was brought was drawn by R on defendant, the latter saying that if R would draw such bill he would pay it on maturity. This bill was subsequently indorsed to plaintiffs, without communication with defendant. It was held that such mere promise, which did not induce a third person to take the bill, did not operate as an acceptance. 1 East, 98.

[53] Daniel, Neg. Inst. § 499; 1 Pars. Notes & B. 287.

[54] Hall v. Steel, 68 Ill. 231; Hough v. Loring, 24 Pick. (Mass.) 254; Nason v. Barff, 2 Barn. & Ald. 26; Koch v. Howell, 6 Watts & S. 350.

[55] Overman v. Hoboken City Bank, 30 N. J. Law, 61; Cox v. Troy, 5 Barn. & Ald. 474.

[56] Dunavan v. Flynn, 118 Mass. 537; Johns. Cas. Notes & B. 72. This is not always so held by all courts. In the case of Jeune v. Ward, the following formed a portion of the opinion of the court: "If a party says he has destroyed the bill and that he will not accept it, such destruction might probably subject him to an action for trover for the bill, but I cannot think that

when a bill, in the ordinary course of business, is left with the acceptor, he is to consider whether he will accept or return it. If he, without saying, retains it in his hands, the law then presumes that he has done that for which the bill was left, and which is for the benefit of the party leaving the bill; that is, that he has accepted it.[57] Probably, however, the rule at present would be, that when a bill is so left, it would be deemed the duty of the party who left it to call for it again, and to inquire whether it had been accepted or not, unless this was contrary to the usual dealings between the parties.[58] However that may be, the reason of the rule is plain. It is that the holder shall not be deprived of his right to hold the drawee as an acceptor where the drawee by his delay or wrongful act might injure the holder, and perhaps put him in a worse position so far as his rights against prior parties are concerned.[59]

SAME—ACCEPTANCE ON SEPARATE PAPER.

51. If the bill is in existence, for the convenience of business the acceptance may be on a separate paper, but the promise must be clear and unequivocal.

52. If the bill is not in existence, for the convenience of business the acceptance may be on a separate paper. Its elements are:

(a) That the contemplated drawee shall describe the bill to be drawn, and promise to accept it.

(b) That the bill shall be drawn in a reasonable time after such promise is written.

(c) That the holder shall take the bill upon the credit of the promise.

it would amount to an acceptance. * * * It would be strange indeed if a refusal * * * could be deemed an acceding to the proposition." 1 Barn. & Ald. 653.

[57] Jeune v. Ward, 1 Barn. & Ald. 653; Harvey v. Martin, 1 Camp. 425.

[58] Matteson v. Moulton, 11 Hun, 268, 79 N. Y. 627.

[59] Dunavan v. Flynn, 118 Mass. 537; Pierce v. Kittredge, 115 Mass. 374; Storer v. Logan, 9 Mass. 55, 60.

Acceptances on a separate paper are of two classes: Those referring to a bill in existence at the time of the acceptance; and those referring to a bill yet to be drawn, and promising to accept it when drawn. Theoretically, as forcibly pointed out by Professor Ames, these acceptances are in defiance of the general principles of the law merchant. By this creation of the law, one indorser who does not see the outside acceptance has no remedy against the acceptor, while his immediate indorsee, who sees and discounts the bill on the faith of the promise, has a remedy his prior indorser had not.[60] As a business expedient, the reasons in support of promises to accept stated by Chief Justice Marshall apply alike to both classes.[61] "The great motive," he said, "for construing a promise to accept as an acceptance, is that it gives credit to the bill, and may induce a third person to take it. If the promise be not known, it can give no credit to the bill; if it be known, an absolute promise to accept will give all the credits to the bill which a full confidence that it will be accepted can give it. As Lord Mansfield said, if one man makes an absolute promise to accept his bill, the drawer or any other person may show it upon the exchange to get credit. Thus, the promise, when shown, gives the credit; the merchant who makes it is bound by it; and this, too, is given as well by a letter written before the bill as one written afterwards." His decision then closes with the declaration "that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding on the person who makes the promise." The reasons for this rule are twofold. One is the practical one that, without it, much embarrassment would be thrown in the way of commercial transactions. A knowledge that a draft will be accepted is often of the utmost importance to the drawer in assisting the negotiation of bills of exchange; and, if the promisor was not bound by what he had written, extensive frauds might be perpetrated. The view which the courts take is that the rule prevents these frauds, and accommodates the mercantile transactions of the country.[62] The other reason was based in

[60] 2 Ames, Bills & N. p. 788.

[61] Coolidge v. Payson, 2 Wheat. 66.

[62] Greele v. Parker, 5 Wend. 414.

its origin upon the great authority of Lord Mansfield in England,[63] supported in the United States by the opinion of Chief Justice Kent,[64] that if the collateral acceptance be shown to a third person, so as to excite credit, and to induce him to advance money on the bill, such third person ought not to suffer by the confidence excited. And these two reasons have generally prevailed over the strongest objection and severest criticism of the opponents of the theory, so that it is at present established law. It is the credit which such acceptance or engagement to accept has given to the bill which gives to it its binding operation.[65]

There is a distinction drawn between acceptances on separate paper or promises to accept existing bills and promises to accept bills to be drawn within a reasonable time in the future. It may be urged that this is a distinction without a substantial difference, but traces of it are found everywhere. The enactments of the New York statutes which are declarative of the general law are such. The statute enacts:[66] "Sec. 7. If an acceptance be written on paper other than the bill, it shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who on the faith thereof shall have received the bill for a valuable consideration. Sec. 8. An unconditional promise in writing to accept a bill before it is drawn shall be deemed an actual acceptance in favor of every person who upon the faith thereof shall have received the bill for a valuable consideration." This distinction lies rather in words than in principle, for throughout both classes run these three principles: (1) In order to make this extrinsic promise an acceptance, credit must be given to it; (2) like every other promise or contract, its subject-matter must be definite or

[63] Pillans v. Van Mierop, 3 Burrows, 1663; afterwards overruled in Johnson v. Collings, 1 East, 98, and Pierson v. Dunlop, Cowp. 573.

[64] McEvers v. Mason, 10 Johns. 206.

[65] Thompson, C. J., in Goodrich v. Gordon, 15 Johns. 6; Cassel v. Dows, 1 Blatchf. 335, Fed. Cas. No. 2,502; Worcester Bank v. Wells, 8 Metc. (Mass.) 107; Steman v. Harrison, 42 Pa. St. 57; Ruiz v. Renauld, 100 N. Y. 256, 3 N. E. 182; Murdock v. Mills, 11 Metc. (Mass.) 5; Carnegie v. Morrison, 2 Metc. (Mass.) 381; Jones v. Iowa State Bank, 84 Ill. 313; Parker v. Greele, 2 Wend. (N. Y.) 545. This is very common as a statutory provision in the laws of various states.

[66] Rev. St. N. Y. (8th Ed.) pp. 2499, 2500.

reasonably so; and (3) the promise must not be a nudum pactum. It must be upon a consideration, or, to express it as it commonly occurs in business transactions, the holder or person claiming the benefit of the promise must have discounted the bill upon the promise. The actual acceptance and the promise to accept differ mainly in the remedies administered upon them. With the actual acceptance there is but the remedy against the acceptor on the bill. With the promise to accept, if there is a refusal to give acceptance, the promisor is sued for breach of ordinary contract for whatever damage the holder of the bill has actually suffered, limited by the amount of the bill, with interest and costs.

These principles exclude from the operation of the rule cases where the indorsee has taken the bill in entire ignorance of the promise, or where the promise is made to some person, not the drawer of the bill, and made with no intention of its being shown as a means of exciting credit.[67] In such cases the promisor is exempted.

[67] Grant v. Hunt, 1 C. B. 44; Stover v. Logan, 9 Mass. 58; Gates v. Parker, 43 Me. 544; Pollock v. Helm, 54 Miss. 1; Exchange Bank of St. Louis v. Rice, 98 Mass. 288. See, contra, Powell v. Monnier, 1 Atk. 611. In this case, the drawee of the bill kept it for some days, entered it on his books and wrote a letter to the holders of the bill that he would duly honor it, nor did he express any suspicions as to the credit of the drawer, who afterwards failed. It was held that the letter constituted a sufficient acceptance to entitle the plaintiffs to recover against the executrix of the drawee. Similar to this is the case of Wynne v. Raikes, in which it was held that where a promise of acceptance was made after a formal refusal to the holder, such promise being made to the drawer after the bill had left his possession and when the promise could not furnish an inducement to an indorser, there was, notwithstanding, an acceptance. 5 East, 514. Where there has been an acceptance, an action may be brought by the holder of the bill; but if there has been simply a promise to accept, the action can be maintained only by the one to whom such promise was made. Henrietta Nat. Bank v. State Nat. Bank, 80 Tex. 648, 16 S. W. 321; Exchange Bank of St. Louis v. Rice, 107 Mass. 37; Howland v. Carson, 15 Pa. St. 453; Carson v. Peacock, 4 Leg. & Ins. Rep. (Pa.) 107; Steman v. Harrison, 42 Pa. St. 49; Spaulding v. Andrews, 48 Pa. St. 411; Bissell v. Lewis, 4 Mich. 450; Pillans v. Van Mierop, 3 Burrows, 1663; Jones v. Council Bluffs Bank, 34 Ill. 313. These last cases are against the present tenor of law. Ilsley v. Jones, 12 Gray, 260; Boyce v. Edwards, 4 Pet. 111; Carrollton Bank v. Tayleur, 16 La. (O. S.) 490.

There remains but one more question to be answered, and that is how definitely must the letter describe the draft to be binding in law as an acceptance of it. The letter need not be an agreement in terms to honor the draft. It may be read in the light of the surrounding circumstances, which may be used by the court to aid in ascertaining its purpose, and in applying and interpreting its language. The absence of technical promissory words is of no practical moment where the language employed is such as to raise an imperative legal obligation.[68] It need not contain a particular description or identification of the bill to be drawn. It is enough if it can be shown that the bill was drawn in pursuance of the authority to that effect. And it is safe to say from an examination of the authorities that in general all that is wanted is a general power to draw and a reasonable intendment; by this last is meant a statement of facts from which a man of ordinary prudence would infer that the power related to the bill which is offered for discount upon the supposed acceptance. If this appears, it is sufficient.

PAROL ACCEPTANCE OF A BILL.

53. In the absence of a statutory intervention, it is the common-law rule that an unequivocal parol promise to accept a specific existing bill is binding. But a promise to accept a future bill, even though the bill be taken by the holder upon the faith and credit of such promise, is not binding as an acceptance.

It is proper to say in the beginning that the doctrine of parol acceptances should be received with extreme caution. It is contrary to the theory of negotiability because it is not an indicium upon the bill, and to the general policy of law because of the vague and often uncertain evidence by which the acceptance itself is proved. But it is undoubtedly the law that oral acceptances of existing

[68] Barney v. Worthington, 37 N. Y. 112; Bank of Michigan v. Ely, 17 Wend. 508, 512; Ulster County Bank v. McFarlan, 5 Hill, 432; Valle v. Cerre, 36 Mo. 575; Nagle v. Lyman, 14 Cal. 451; Nelson v. First Nat. Bank, 48 Ill. 39; Nevada Bank v. Luce, 139 Mass. 488, 1 N. E. 926.

bills[69] are valid and binding acceptances. The reasons given for this rule are much the same as those given for separate acceptances in writing. A verbal promise is treated as an acceptance because sound principles of morality require that one who promises another, although by parol, to accept a particular bill of exchange, and thereby induces him to advance his money upon such bill in reliance upon such promise, should be held to make good his promise. The party advances money upon an original promise upon a valuable consideration, and the promisor is bound to carry out his undertaking. Whether it is held to be an acceptance, or whether he is subject to damages for a breach of his promise to accept, or whether he is held to be estopped from impeaching his word, is a matter of form merely. The result in either event is to compel the promisor to pay the amount of the bill with interest.[70] It would seem that this reason would apply alike to instances of existing bill and of non-existing bill, yet the cases make a distinction between them. And with all respect to the able judges who have laid the rule down, it is submitted that there is no greater moral reason for paying an existing bill upon a verbal promise to pay it than a bill subsequently drawn and discounted upon the faith that it would be paid when drawn. Yet the courts say that a verbal promise to pay a non-existing bill, even with the qualification that the bill is subsequently taken on the faith of it, does not amount to an acceptance,

[69] Scudder v. Union Nat. Bank, 91 U. S. 406; Sturges v. Fourth Nat. Bank, 75 Ill. 595; Dull v. Bricker, 76 Pa. St. 255; Nelson v. First Nat. Bank, 48 Ill 37; Elliott v. Miller, 8 Mich. 132.

[70] Townsley v. Sunrall, 2 Pet. 170; Boyce v. Edwards, 4 Pet. 111; Scudder v. Union Nat. Bank, 91 U. S. 406; Scott v. Pilkington, 15 Abb. Prac. 280; Bissell v. Lewis, 4 Mich. 450; Williams v. Winans, 14 N. J. Law, 339; Bank of Ireland v. Archer, 11 Mees. & W. 383. In this case, a party being requested to accept a bill to be subsequently made, said: "Send it for acceptance as usual, remitting proceeds at the same time, and I will advise my partner." In an action on the bill it was held that a parol promise to accept a bill of exchange afterwards drawn, on the faith of which promise the bill is discounted, does not amount to an acceptance. Johnson v. Collings, 1 East, 98; Kennedy v. Geddes, 8 Port. (Ala.) 263; Mercantile Bank v. Cox, 38 Me. 500; Plummer v. Lyman, 49 Me. 229; Wilson v. Clements, 3 Mass. 1; Edson v. Fuller, 22 N. H. 183, 188; Wakefield v. Greenhood, 29 Cal. 600; Pike v. Irwin, 1 Sandf. 14; Taylor v. Drake, 4 Strob. (S. C.) 431.

because in order to constitute an acceptance there ought to have been a bill in existence to be accepted. And to hold that the same act would be an acceptance or not, according to the varying relations of the subsequent holders of the bill, would introduce a strange anomaly and confusion into the relation of the parties to the bill, the drawee being an acceptor as to some and not as to the other indorsees. There is one further objection to be noted to parol acceptances which is found in the cases. It is that a parol acceptance is obnoxious to that provision of the statute of frauds which provides that all promises to answer for the debt of another shall be in writing and signed by the promisor. It is maintained that an acceptance is such a promise, and particularly in the case when it is an accommodation acceptance, because then the acceptor merely guaranties some one else's debt. But despite the respectable authority supporting this view, its reasons do not seem sound. In issuing a bill the drawer says to the drawee, "Pay so much money to the payee, and I will repay it to you," and the drawee in his acceptance thereupon promises to pay the money called for in the bill to the payee. The promises are thus original and independent. And if money is paid on the faith of it, there is an original consideration moving between the parties to the contract. Damage to the promisee constitutes as good a consideration as benefit to the promisor. And where there is a substantial credit given by the party to the drawer upon the bill, and the party parts with his present rights at the instance of the promisee, this promise is substantially a new and independent one, and not a mere guaranty of the existing promise of the drawer. The object of the promise is to induce the party to take the bill upon the credit of the promise, and, if he so take it, it binds the promisor.[71]

ACCEPTANCE FOR HONOR OR SUPRA PROTEST.

54. DEFINITION—An acceptance supra protest is an undertaking by a stranger to the bill, after protest, for the benefit of all parties subsequent to him for whose honor

[71] Townsley v. Sumrall, 2 Pet. 170.

it is made, and conditioned to pay the bill when it becomes due if the original drawee does not.

55. An acceptance supra protest may be made—

(a) After dishonor by non-acceptance.

(b) After protest for better security after acceptance.

The acceptance for honor is an exception to the rule (supra, § 46) that no one but the drawer can be an acceptor. It is not commonly met with in this country, and therefore it is our purpose to outline without much discussion the rules concerning it.

In its nature it is a sort of conditional acceptance, the contract being, as we shall hereafter see (see post, § 72), to pay if, upon further presentment of the bill to the drawee for payment at maturity, it is again dishonored and duly protested. The bill must in the first instance be presented to the drawee and protested, because the drawer and indorsers have a right to a presentment to and demand of the drawee and also a right to the full legal form of protest.[72] But protest once being made, any person not a party to the bill may accept it for the honor of any other party to it, or there may be successive acceptors to the bill for the honor of different parties to it,[73] or any one acceptor may accept for any or all parties to the bill. The method of making an acceptance for honor is for the party to appear before a notary public and declare that he accepts such protested bill in honor of the drawer or indorsers, as the case may be, and he then in some form of writing signifies such acceptance. Usual forms are "Accepts S. P.," or "Accepted for the honor of X." As soon as this form is complete, it is the duty of the acceptor for honor to notify the parties to the bill for whose honor he has accepted. Of course, no holder is bound to take the acceptance of such an acceptor, but having once accepted it he is bound by it and cannot sue such party until the maturity of the bill and its dishonor by the acceptor supra protest.[74]

There is a species of acceptance for honor known as the protest

[72] Story, Bills, § 256.

[73] Konig v. Bayard, 1 Pet. 250.

[74] Williams v. Germaine, 7 Barn. & C. 468, 1 Man. & R. 394.

for better security. According to Mr. Chitty,[75] "The custom of merchants is stated to be that if the drawee of a bill of exchange abscond before the day when the bill is due, the holder may protest it in order to have better security for its payment, and should give notice to the drawer and indorsers of the absconding of the drawee; and if the acceptor of a foreign bill become bankrupt before it is due, it seems the holder may also in such case protest for better security. The neglect to make this protest will not affect the holder's remedy against the drawer and indorsers, and its principal use appears to be that by giving notice to the drawer and indorsers of the situation of the acceptor, or by which it is become improbable that payment will be made, they are enabled by other means to provide for the payment of the bill when due." [76]

[75] Chit. Bills, 383.

[76] Daniel, Neg. Inst. § 530. See, also, Ex parte Wackerbarth, 5 Ves. 574.

CHAPTER IV.

INDORSEMENT.

56. Definition.
57. Formal Requisites.
58-59. Indorsement in Blank.
60-61. Indorsement in Full.
62-64. Indorsement without Recourse, Conditional and Restrictive Indorsement.
65. Nature of Indorsement.
66. Requisites of Indorsement.
67-68. Anomalous Indorsements.

DEFINITION.

56. INDORSEMENT—Is the writing of the name of the indorser on the instrument with the intent either to transfer the title to the same, or to strengthen the security of the holder by assuming a contingent liability for its future payment, or both. It strictly applies only to negotiable instruments.

FORMAL REQUISITES.

57. The formal requisites of an indorsement are:

(a) Though usually on the back of the instrument it is valid on its face, but it must be somewhere upon it. When by reason of rapid circulation the instrument becomes filled with indorsements, the law merchant permits the holder to paste on a slip of paper for his own and subsequent indorsements. This is called an allonge.

(b) Any form of words with the signature from which the intent of the holder to indorse may be gathered is a sufficient indorsement. The usual signature of the indorser is the common form of indorsement, but any emblem of that signature will suffice.

An indorsement is classed by itself as a distinct body of contract rights and liabilities. It has its origin in and is confined to the theory of negotiability.[1] In the illustration under § 10, which we have so often referred to, B pays A £1,000, and A gives the bill to him; D pays B £1,000, and B indorses the bill to him; and E pays D £1,000, and D indorses the bill to him. In each instance B, D, and E get what for their purposes is as good and better than £1,000 in gold. And, in turn, as B or D was paid the £1,000, and indorsed the bill, he assumed some liability. He did all he could to assure the indorsee, who paid the £1,000 to him, that he in turn would get his money. He said to the indorsee: "You give me £1,000 in gold, which cannot be transported because of its weight, or £1,000 in bank notes, which are inconvenient to carry because of their danger of being lost, and I will give you a claim payable to you alone, and which at New York or Charleston or Jamaica will be just as good to you as the £1,000 in gold or bank notes would have been. You may safely take this, because if C does not accept or pay this, or A does not pay this as drawer, I, to whom you have paid the £1,000, will repay it to you."[2] "A payee or subsequent holder," says Professor Ames, "instead of holding a bill and collecting it at maturity, may wish to transfer his interest in it to another, in which case he indorses the bill. He writes and signs upon the back of the bill an order directing its payment to the desired transferee. The order is written with mercantile conciseness: 'Pay A [Signed] X,'—the other terms being contained upon the face of the bill. The custom of merchants has attached to this order a liability similar

[1] Orrick v. Colston, 7 Grat. 195; Bank of Marietta v. Pindall, 2 Rand. (Va.) 475. In Whistler v. Forster, which was an action by the indorsee of a check against the drawer, it was held that the holder of a bill payable to order must obtain an indorsement and is affected by notice of fraud until he does so, and until such indorsement is obtained he has no better right than his assignor. 14 C. B. (N. S.) 248. In an action against certain parties as the indorsers of a bill it was claimed that such parties were liable, even though the indorsement was shown to be a forgery, on the ground that the writing must have been by the defendant's authority. This was held not to be an indorsement such as would entitle the plaintiffs to recover. Moxon v. Pulling, 4 Camp. 56; Dunning v. Heller, 103 Pa. St. 269.

[2] Ingalls v. Lee, 9 Barb. 647; Hill v. Lewis, 1 Salk. 132; Evans v. Gee, 11 Pet. 80.

to that which attaches to the order of the drawer. By an indorsement, therefore, a party not only passes his interest in the bill to another, but also pledges his credit for the honor of the bill. In other words, an indorsement is at once a transfer and a contract."

The student must fully grasp this idea,—that the indorsement is a contract, and a contract to which the law merchant and the common law have appended very peculiar conditions. It is a contract something in the nature of a guaranty,[3] something in the nature of a warranty, and to the liability under which the laws have attached the very unusual conditions of presentment, demand, and notice of dishonor.[4] It is, to be sure, an evidence of a transfer of title, but it is principally a development of a form of contract at the hands of the creators of the body of rules of the law merchant. We may be pardoned in referring again to the illustrations under §§ 12 and 13. In these instances the drawer or maker contracted to pay "John Smith, or his order," meaning John Smith, or some person to whom John Smith especially directed the sums of money called for in the instruments should be paid. The only construction of this would be that John Smith must direct payment. He must direct it in writing. Until he does so direct it, and evidences this direction by writing it on the instrument, the title to the instrument, and the right to the sum of money called for by its terms, remain in him. But, when he does direct it by indorsing it, that (under the law merchant) shows to all the world that John Smith has signified his wish that it should be paid to some person.

In the place and form of the words of the indorsement, the law looks rather to the intention of the parties than to a strict compliance with its usual forms. According to the usual method, an indorsement, as its name implies, is written on the back of the instrument. And indeed this usual method and this original meaning carry with them such force that it has been held that where one alleges that a note was "indorsed" he may be presumed to mean that there was writing of some kind on its back.[5] But neither

[3] Oakley v. Boorman, 21 Wend. 588; Kingsland v. Koeppe, 137 Ill. 344, 28 N. E. 48; Id., Johns. Cas. Bills & N. 118; De Pauw v. Bank of Salem, 126 Ind. 553, 25 N. E. 705, and 26 N. E. 151; Id., Johns. Cas. Bills & N. 128.

[4] Osgood's Adm'rs v. Ortt, 17 Fed. 575, Johns. Cas. Bills & N. 107.

[5] Gorman v. Ketchum, 33 Wis. 427.

this customary method nor this original meaning are allowed by the law to prevail over the purpose and intention of the parties. And an indorsement elsewhere upon the instrument is as much an indorsement as though written upon its back.[6] It may, for example, be upon its face,[7] or it may be and frequently is where indorsements have covered the back of the paper upon the extension of the instrument referred to in the principle text as an allonge.[8] But it must be somewhere upon the bill or note, for if upon a separate paper the transfer is not an indorsement, but an assignment,[9]—and the transferer cannot avail himself of the privileges, nor is he subject to the rules governing indorsement. So, too, in the form of words of an indorsement, the law looks to the intention rather than the method of expression of the parties. For while a signature or some of the forms of words we shall hereafter discuss are the usual forms, yet initials, or figures,[10] or writing in pen or in pencil,[11] or a mark, if they evidence an intention to indorse, can create a binding indorsement. This rule is usually the subject of discussion in interpreting words of transfer on the back of instruments, which seem to imply an assignment rather than indorsement. The most often quoted instance of such an expression is, "I hereby assign this draft," which Gurney, B., declared "to amount to nothing more than an ordinary indorsement." [12] And the interpretation given

[6] In Young v. Glover, the defendants wrote their names on the face of an accepted bill, under the name of the acceptor. It was contended that this was not an indorsement according to the custom of merchants. The intention of the defendants to assume liability as indorsers being clear, there was held to be a good indorsement, and that the place of writing was immaterial. 3 Jur. (N. S.) 637; Schwenk v. Yost, 9 Wkly. Notes Cas. (Pa.) 16.

[7] Ex parte Yates, 27 Law J. Bankr. 9; Com. v. Butterick, 100 Mass. 12; Rex v. Bigg, 3 P. Wms. 419.

[8] Folger v. Chase, 18 Pick. 63; French v. Turner, 15 Ind. 59.

[9] Fenn v. Harrison, 3 Term R. 757. In this case the indorsement was upon a mortgage which was given with the note as collateral security, and was to this effect: "I hereby assign the within mortgage and notes therein described." This was held not to be a proper indorsement, under the requirement that it should have been made "thereon," or "on another paper annexed, * * * when there are many successive indorsements to be made." Story, Bills, § 204.

[10] Brown v. Butchers' & Drovers' Bank, 6 Hill (N. Y.) 443.

[11] Geary v. Physic, 5 Barn. & C. 234.

[12] Richards v. Frankum, 9 Car. & P. 221.

by the courts to such a form of words, written on instruments in the place where indorsements are usually found, is that the transferer, in making the writing evidencing a transfer, intended such a transfer as is usually made of such instruments. In other words, he may be reasonably presumed to have intended to turn over the paper in the usual business way, although he did not choose business words peculiarly appropriate for that purpose. The usual business way is by indorsement. Therefore it is reasonable to presume that an indorsement rather than an assignment was intended. And so such words, unless they contain expressions clearly showing an intention to exempt the transferer from an indorser's liability, are treated as an indorsement.[13] It may be that there is one exception to the foregoing rule, though there is weight of contrary authority. It is that, where one contracts in the form of a guaranty on the back of a bill or note, he cannot be made liable as an indorser.[14] A guaranty is declared by the courts to mean a guaranty, and not an indorsement.[15] And this one rule of interpretation differs from

[13] Sears v. Lantz, 47 Iowa, 658; Shelby v. Judd, 24 Kan. 166; Fassin v. Hubbard, 55 N. Y. 465; Hall v. Toby, 110 Pa. St. 318, 1 Atl. 869.

[14] In an action on a promissory note it was shown that the payee of a note transferred the same to a third party, having first written over his signature: "I hereby guaranty the within note." It was held by the court that, where the name of the payee was indorsed on the back of the note in no other form than as a signature to a guaranty fully written out, this was not such an indorsement as authorized a subsequent holder to sue upon it as indorsee. Belcher v. Smith, 7 Cush. (Mass.) 482. And see Tuttle v. Bartholomew, 12 Metc. (Mass.) 452; Fullerton v. Hill, 48 Kan. 558, 29 Pac. 583; Id., Johns. Cas. Bills & N. 124. As to liabilities of guarantors and sureties, see Gridley v. Capen, 72 Ill. 11, Johns. Cas. Bills & N. 209; Read v. Cutts, 7 Me. 186, Johns. Cas. Bills & N. 210; Temple v. Baker (Pa. Sup.) 17 Atl. 516. For distinction between guarantor and surety, see La Rose v. Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805; Id., Johns. Cas. Bills & N. 213.

[15] Where the payment of a note is guarantied subsequent to its delivery there must be a distinct consideration. Had the guaranty been written before the delivery, no other consideration would have been necessary than that implied in the note. By the statute of the state, since the guaranty did not express any consideration, it is void. Moses v. Lawrence Co. Bank, 149 U. S. 298, 13 Sup. Ct. 900. And see Leonard v. Vredenburg, 8 Johns. (N. Y.) 29; Tinker v. M'Cauley, 3 Mich. 188; Phelps v. Church, 65 Mich. 231, 32 N. W. 30; Hunt v. Adams, 7 Mass. 518; Spaulding v. Putnam, 128 Mass. 363; National Bank of Commonwealth v. Law, 127 Mass. 72; Dubois v. Mason, Id. 87.

the other in that the words are not doubtful words of transfer, but are plain words, having a plain legal meaning. Hence it is not proper for courts to seek to construe the meaning of words which are already settled beyond dispute. It is only their province to enforce the contract in the clear words in which it stands, and that contract they will enforce as a guaranty.[16]

INDORSEMENT IN BLANK.

58. AN INDORSEMENT IN BLANK—Means that the instrument is to be paid to whomsoever may hold it. There may be successive indorsements in blank.

59. The indorsee in blank, or any subsequent bona fide holder, may write over an indorsement in blank any contract consistent with the character of the indorsement.

In form an indorsement in blank consists in writing merely the name of the payee or indorser upon the back of the instrument. Thus, if John Smith, in the illustration mentioned in § 12, indorsed the instrument in blank, he would write simply "John Smith" on the back of it. How the courts have interpreted this appears from Peacock v. Rhodes[17] and Grant v. Vaughan,[18] which have been generally adopted as the law.

Peacock v. Rhodes was a case of a bill indorsed in blank by the payee to a third person, and stolen from the third person, and received by a bona fide purchaser for value. Lord Mansfield said, "There is no difference between a note indorsed in blank and one payable to bearer;" and it was deemed that such a bill is to be treated as so much cash, unless the payee chooses by a specific indorsement to some person to restrain its currency. The court construed the contract to mean that the payee might follow out the contract em-

[16] Brown v. Curtiss, 2 N. Y. 225. But see Upham v. Prince, 12 Mass. 14; Manrow v. Durham, 3 Hill (N. Y.) 584, and cases cited; Barrett v. May, 2 Bailey (S. C.) 1; Partridge v. Davis, 20 Vt. 449; Vanzant v. Arnold, 31 Ga. 210; Judson v. Gookwin, 37 Ill. 286,—holding a contrary doctrine to the apparently reasonable doctrine of the text.

[17] Peacock v. Rhodes, 2 Doug. 633.

[18] Grant v. Vaughan, 3 Burrows, 1516.

bodied in the bill, "Pay to John Smith, or such person as he directs," and that, when he so indorsed, he was deemed to say, "You may pay to any one who holds the bill." In Grant v. Vaughan, the maker of a note to bearer, was sued by Grant, who gave value for the note to a person who had found it, and who had no right to it. It was contended that Grant could only recover from the person from whom he got the note. But the court construed the contract of Vaughan otherwise.[19] In these cases the law goes to the limit that the true owner cannot recover in trover from the bona fide holder.

The student must keep in mind that this relates only to an instrument held by a bona fide holder.[20] Where the instrument is not in the possession of a bona fide holder, but of the finder or the thief, this extreme rule does not apply. The instrument is, then, like all other property. It cannot be enforced by the wrongful holder. But, when once it is in the hands of the bona fide holder, then it is treated as money in the ordinary course of business. On account of its currency, it cannot be recovered after it has passed in currency. Alike in case of money and of paper indorsed in blank, where either has been stolen or found, the true owner cannot recover after it has been paid away fairly and honestly upon a valuable consideration, because it is necessary for the purposes of commerce that its currency should be established and secured.

Very much like this general power, vested in the payee or subsequent indorser, to vest any lawful holder with the power to enforce the payment of the instrument,[21] is the power conferred upon the in-

[19] See, also, Miller v. Race, 1 Burrows, 452. This was an action in trover to recover a bank note payable to W. F. or bearer, on demand. The note was stolen, and later came into the plaintiff's possession. Upon notice of the robbery, W. F. ordered payment stopped on the note. It was held that such note, when it came into the hands of a third party, for value and without notice, could not be followed.

[20] As to who is a bona fide holder, see Johnson v. Way, 27 Ohio St. 374, Johns. Cas. Bills & N. 185; Dresser v. Missouri & I. Ry. Const. Co., 93 U. S. 92, Johns. Cas. Bills & N. 187; Brook v. Teague, 52 Kan. 119, 34 Pac. 347; Id., Johns. Cas. Bills & N. 189; Lenheim v. Fay, 27 Mich. 70; Rickle v. Dow, 39 Mich. 91.

[21] In this connection, see the case of Trimbey v. Vignier, in which, under the French law, it appears that an indorsement in blank was insufficient to pass

dorsee in blank to write over the indorsement any contract consistent with the character of the instrument. The authority followed in most jurisdictions is Russell v. Langstaffe.[22] There the defendant indorsed his name in blank on five copper-plate notes, the body of the notes being at that time not filled out. Upon the trial, on behalf of the defendant, it was urged that, because, these notes were blank at the time of the indorsement, they were not promissory notes; and that no subsequent act could alter the original nature or operation of the defendant's signature, which, when written, was a mere nullity. Lord Mansfield, in deciding the case, used these often-quoted words: "The indorsement on a blank note is a letter of credit for an indefinite sum." The defendant said: "Trust Galley to any amount, and I will be his security." The amount of the main instrument being left blank, an authority to fill it in for any sum was implied. The terms of the body of the note or bill are the principal terms of the contract of indorsement, and nothing inconsistent with these can be implied from the indorsement. Says Judge Cowen:[23] "The holder may put the blank paper in any form which shall accord with the intent of the names, either as makers, drawers, payees, or indorsers. This power of the bona fide holder depends upon the intent of the parties not written out in full, but evinced by the character of the slip on which the name appears." And so an indorsement in blank signifies not only that it was the payee's or subsequent indorser's mind and wish that the money called for in the instrument should be paid by the maker or acceptor to whomsoever should lawfully have it in his possession, but also that

title, and that the holder by such indorsement could not sue in his own name. 1 Bing. N. C. 151. See, also, in regard to the effect of indorsement under the French law, Lebel v. Tucker, in which case it was held that where a bill was drawn as well as accepted in England an indorsement in blank was valid. L. R. 3 Q. B. 77. The case of Bradlaugh v. De Rin was decided rather in opposition to the principles laid down in Trimbey v. Vignier; the court considering that the decision in that case was made under a mistake of fact, and holding that there was no evidence that the plaintiff in Trimbey v. Vignier might not have sued under the French law. L. R. 5 C. P. 473. As to the effect of subsequent indorsements upon an indorsement in blank, see Bailey v. Armstrong, 4 Wkly. Notes Cas. 381; Gould v. Mortimer, Id. 322.

[22] Russell v. Langstaffe, 2 Doug. 514.

[23] Dean v. Hall, 17 Wend. 214.

over such indorsement—which may be treated in itself as a blank general power—a subsequent holder might write any modification of the instrument which was not inconsistent nor a material alteration of its terms.[24] He may not write over a blank indorsement a waiver of demand and notice;[25] or he may not change such an indorsement into a guaranty.[26] He cannot split up the instrument, making part of the sum called for in it payable to one person, and part payable to another.[27] All these change the terms of the contract as they are implied in law. But, if there are successive indorsements in blank, the holder may fill up the first to himself, or he may deduce his title through all, or he may strike out any or all, or he may turn the instrument over to a stranger without indorsement by himself;[28] for all these instances in no wise change the ten-

[24] Camden v. McKoy, 3 Scam. (Ill.) 437; Webster v. Cobb, 17 Ill. 459; Hance v. Miller, 21 Ill. 636; Maxwell v. Vansant, 46 Ill. 58; Boynton v. Pierce, 79 Ill. 145; Tenney v. Prince, 4 Pick. (Mass.) 385; Central Bank v. Davis, 19 Pick. (Mass.) 373. But see Allen v. Coffil, 42 Ill. 293. In Dale v. Gear it was held that parol evidence was not admissible to prove that an indorsement in blank of a promissory note was to be considered as without recourse by a special agreement between the parties, where there was no evidence of any agency or equity as between them. 38 Conn. 15.

[25] Central Bank v. Davis, 19 Pick. (Mass.) 373.

[26] Seabury v. Hungerford, 2 Hill (N. Y.) 80; Blatchford v. Melliken, 35 Ill. 434; Seymour v. Mickey, 15 Ohio St. 515.

[27] Erwin v. Lynn, 16 Ohio St. 547; Lindsay v. Price, 33 Tex. 282.

[28] Smith v. Clarke, Peake, 225. In this case a bill indorsed by payee, and with subsequent indorsements, came into the hands of J. under a special indorsement. J. sent the bill, without indorsement, to another party, who discounted the same with plaintiffs, who had struck out all save the first indorsement. It was objected that the instrument was affected by the special indorsement, but it was held that a fair holder of a bill might consider himself the payer's indorsee, and strike out other indorsements. For a similar holding, see Mitchell v. Fuller, 15 Pa. St. 268; Josselyn v. Ames, 3 Mass. 274; Sweetser v. French, 13 Metc. (Mass.) 262; Jackson v. Haskell, 2 Scam. (Ill.) 565; Burnap v. Cook, 32 Ill. 168. As to the liability of a special indorser, see Johnson v. Mitchell, 50 Tex. 212, Johns. Cas. Bills & N. 132; Cole v. Cushing, 8 Pick. (Mass.) 48; Ellsworth v. Brewer, 11 Pick. (Mass.) 316. In Day v. Lyon it was held that although, by an indorsement in blank, the transferee was authorized to fill in the blank, he must do so before submitting the note in evidence in a suit thereon. 6 Har. & J. (Md.) 140; Walker v. Macdonald, 2 Exch. 527; Morris v. Foreman, 1 Dall. (Pa.) 193; Cutting v. Conklin, 28 Ill.

or of the main instrument, or effect an alteration in the letter or the spirit of its terms. There is no objection to injecting a special indorsement upon an instrument payable to bearer or under an indorsement in blank. It merely limits the person or class of persons to whom an indorser signifies that he is willing to pay the instrument. Such an indorser says, in effect, "I will pay my indorsee, and such person as he directs." Hence, to recover against such an indorser, title through his indorsee must be proved by proving his indorsee's signature. Such a contract is not inconsistent with what may be supposed to have been in the mind of the indorser when he wrote his name on the instrument. The indorsee may treat any indorsement as transferring the instrument to himself, and may change it to a form to express this intention.

INDORSEMENT IN FULL.

60. AN INDORSEMENT IN FULL—Means that none but the indorsee or the person to whom the bill or note is ordered paid can demand its payment, and that only the indorsee in full can transfer the instrument by adding his own indorsement.

61. An instrument which is originally payable to bearer, or which has been indorsed in blank, though afterwards indorsed in full, is still payable to bearer; except as to the special indorser, who, on such an instrument, after such an indorsement, is only liable on his indorsement to such parties as make title through it.

An indorsement in full is in form commonly in this wise: If it were by John Smith, the payee in the illustration under §§ 12 and 13, it would be, "Pay to the order of John Jones," or "Pay to John Jones, or order," or simply, "Pay John Jones." While the indorsement in full, or the special indorsement as it is indifferently called, must name the indorsee, the indorsement need not neces-

506; Morris v. Preston, 93 Ill. 215; Wooley v. Lyon, 117 Ill. 244, 6 N. E. 885; Savannah Nat. Bank v. Haskens, 101 Mass. 370; Watervliet Bank v. White, 1 Denio (N. Y.) 609; Esty v. Snyder, 41 Ill. 363; Rand v. Dovey, 83 Pa. St. 280; Emerson v. Curtis, 12 Mass. 78; Vincent v. Horlock, 1 Camp. 442.

sarily be in words negotiable. It may be either "Pay to John Jones," or "Pay to the order of John Jones." In either case John Jones may negotiate the note away. This is because the original instrument was negotiable. It contemplated its passing from hand to hand. Hence, in the illustration, John Smith, the payee, may direct that the instrument be paid to John Jones, and John Jones, upon delivery, being the owner, may direct that it be paid to Thomas Robinson, and the maker must pay to Thomas Robinson, or to John Jones, or to John Smith; so, also, must John Jones pay to Robinson, because Robinson has a right of action against Jones, and Jones against Smith; hence Robinson has also a right of action against Smith.[29]

When an instrument is specially indorsed, title can only be transferred from the indorsee by his indorsement. In the very outset, this principle must be sharply contrasted with the case of bills or notes payable to bearer or indorsed in blank. With bills or notes payable to bearer or indorsed in blank, the holder is presumed to be the owner. Possession and title are one and the same thing, and this though the party possessing it is in no wise a party to the instrument. But where the direction in the contract is to pay specially to some person, that person and no other can direct that the money is to be paid in its turn.[30] No other person can

[29] Leavitt v. Putnam, 3 N. Y. (3 Comst.) 494; Edie v. East India Co., 1 W. Bl. 295, 2 Burrows, 1216. In the latter case it was claimed that a special indorsement to A B, the words "or order" being omitted, was equivalent to a restrictive indorsement; but it was held that, since an indorsement to the order of A enables him to maintain an action, an indorsement to A will, a fortiori, enable him to indorse. In More v. Manning the holding was to the same purpose. An assignment was made to W., and not to him and order; and it was claimed that W. could not assign, for, by so doing, W.'s assignor would be liable to suit by subsequent indorsees. It was held that the assignee of a bill has all the interest in it, and may assign to whom he pleases. Comyn, 311; Hodges v. Adams, 19 Vt. 74.

[30] Colson v. Arnot, 57 N. Y. 253; Mead v. Young, 4 Term R. 28. In the case of Mead v. Young a note was drawn on defendant, payable to "Henry Davis or order," but came into possession of another Henry Davis. The bill was accepted by defendant, and the plaintiff, being requested by Davis to discount it, inquired of defendant if the acceptance was his. This being affirmed, the bill was discounted, the plaintiff not knowing Davis. It was held, on an action being brought, that "as no person can demand payment of a bill of exchange but

personate this indorsee, and by forgery satisfy the conditions of this contract. And it does not avail even that the bill is paid under a forged indorsement. Such payment or transfer was not in contemplation of the parties making the contract, and is utterly void.[31]

In case of the combination of the two classes,—indorsements in blank and in full,—the application of the rules is somewhat confusing to the student. For example, let us assume that there are indorsed upon an instrument some blank indorsements, then some special indorsements, and after these again some indorsements in blank. The special indorser will be liable only to those "who can make their title through his special indorsement." The rule is well settled that if a note or bill be once indorsed in blank, though afterwards indorsed in full, it will still, as against the drawer, the payee, and prior indorsers, be payable to bearer, though, as against the special indorser himself, title must be made through his indorsee. Suppose the following to be a series of indorsements: (1) John Smith. (2) Pay to the order of Thomas Robinson. Richard Roe. (3) Thomas Robinson. In such cases the rule is laid down in Bank v. White.[32] In that case, the suit was upon a promissory note, payable to a W. J. Worth, and made by White, the defendant. It was indorsed in blank by Worth and by E. Olcott, and had upon it a special indorsement, in these words: "Pay to E. Olcott, or order. [Signed] E. C. Kendrick, Cashr." It was objected that no formal transfer of the note had been shown from Olcott. But the court said that, in suing the payee under a blank indorsement, this was not necessary. Worth's signature was sufficient. Only in case of suit against Olcott would it have been necessary to prove Kendrick's signature. All the bank must needs prove was the signature of

the payee, or the person authorized by him, the acceptor only undertakes to pay to them, and cannot be compelled to pay to any other person," and if he makes such payment it will not discharge his debt to the drawer.

[31] Graves v. American Exch. Bank, 17 N. Y. 205; Holt v. Ross, 54 N. Y. 472; Chambers v. Union Bank, 78 Pa. St. 205; Espy v. Bank of Cincinnati, 18 Wall. 604.

[32] Watervliet Bank v. White, 1 Denio, 608; Pentz v. Winterbottom, 5 Denio, 51.

the payee in blank. And, in the example we are illustrating, any holder, to sue Richard Roe, must prove in addition to his signature the signature of Thomas Robinson, because the indorsement is a special order or indorsement to Thomas Robinson.[88] But in the other cases, the indorsement in blank would presuppose right and possession, and merely the signature of the indorser sought to be recovered against would have to be proved.

INDORSEMENT WITHOUT RECOURSE, CONDITIONAL AND RESTRICTIVE INDORSEMENT.

62. AN INDORSEMENT WITHOUT RECOURSE—Means that the indorser exempts himself from liability to indemnify the holder upon the dishonor of the bill or note.

63. A CONDITIONAL INDORSEMENT—Means an indorsement by which the title to the instrument does not pass until the condition mentioned in the indorsement is fulfilled.

64. A RESTRICTIVE INDORSEMENT—Means that the indorsee is deputed by the indorser to be his agent in collecting the bill or note, or else that the title is vested in the indorsee as a trustee or for the use or for the benefit of a third person.

[88] Johnson v. Mitchell, 50 Tex. 212; Smith v. Clarke, 1 Esp. 180, Peake, 225; Walker v. MacDonald, 2 Exch. 527, 17 L. J. Exch. 377; Mitchell v. Fuller, 15 Pa. St. 268; Dudman v. Earl, 49 Iowa, 37; Burnap v. Cook, 32 Ill. 168; Harrop v. Fisher, 30 L. J. C. P. 283. In this case a bill was drawn, payable to the order of the drawer, one Johnson. The bill was discounted by R., but Johnson failed to indorse, and subsequently left the country. The acceptor refused to accept, on account of the omission to indorse, and R. then indorsed to the plaintiff for Johnson. It was at first decided that the inference might be drawn that Johnson authorized such indorsement, but on appeal it was held that evidence of authority was wanting, and that the law would not infer it. Watervliet Bank v. White, 1 Denio, 608; Pentz v. Winterbottom, 5 Denio, 51.

We have seen that, whether an indorser makes a blank or a special indorsement upon the instrument, he both incurs a liability as an indorser thereon, and transfers it. This is true of indorsements generally, whatever be their form, provided the intention to be bound and to transfer be present. If these can be construed from its form, it is sufficient to make the writing an indorsement. For example, the words, "I this day sold and delivered to C. A. the within note,"[84] were deemed an indorsement. And any form of words consistent with the tenor of the main instrument, and showing such intention, will be treated by the courts as creating the contract.

The needs of commerce have created special forms of indorsement modifying and limiting the effect of this contract, without, in many instances, destroying the negotiability of the main instrument. For example, an indorser may exempt himself from liability as an indorser by an indorsement without recourse, and yet the instrument remain negotiable. He may perhaps, by a conditional indorsement, give all subsequent parties notice that, so far as he is concerned, the title to the instrument has not vested in his indorsee and subsequent parties, and that the instrument cannot be safely paid to the holder until some condition written upon it is fulfilled, or he may restrict it in its circulation. The reason of these indorsements is to be kept carefully in mind while examining them. They are based upon the idea that the right of property in the lawful owner implies the right, not merely to sell it outright, but also to make such disposition of it as he sees fit.

Indorsement without Recourse.

The indorsement without recourse is in form of words, "Without recourse," or "Sans recourse," or "At the indorsee's own risk,"[85] or "I hereby indorse and transfer my right and interest in this bill to C D, or order, but with this express condition: that I shall not be liable to him or to any subsequent holder for the acceptance or

[84] Adams v. Blethen, 66 Me. 19; Pinnes v. Ely, 4 McLean, 173.

[85] Rice v. Stearns, 3 Mass. 225; Richardson v. Lincoln, 5 Metc. (Mass.) 201; Fitchburg Bank v. Greenwood, 2 Allen (Mass.) 434; Welch v. Lindo, 7 Cranch, 159; Mott v. Hicks, 1 Cow. 513; Craft v. Fleming, 46 Pa. St. 140; Stevenson v. O'Neal, 71 Ill. 314; Walter v. Kirk, 14 Ill. 55.

payment of the bill." [36] Such indorsements throw no discredit on the bill.[37] Such an indorser does not escape from the effect of the warranties, as explained hereafter.[38] The promisee of a negotiable bill or note indorses it to a third person, merely stipulating that, as the indorser, he is not to be responsible if the acceptor or maker does not pay it. This he may do, because he has the property in the bill or note, and he may dispose of it on what terms he pleases. Such an indorsement does not render the negotiable security no longer negotiable.[39] The bill or note remains negotiable in the hands of the indorsee, although he has no remedy against the indorser, without recourse. And, into whose hands soever the bill or note may come, the maker is still liable according to the terms of his original contract.[40] The question with the courts in construing indorsements without recourse is whether the words of the indorsement are such that they clearly express an intention on the part of the indorser not to be bound, and a corresponding intention on the parts of the immediate subsequent indorsees, evidenced by their acceptance of the instrument with such an indorsement, to exempt the indorser from his liability.[41] The presumption is rather that the usual liability of an indorser is intended to be incurred. And, to overcome this, it must clearly appear that the transfer of the instrument was only to transfer the title to it, and not to indemnify the indorsee against loss in case it was not paid by the acceptor or maker.

Conditional Indorsement.

The conditional indorsement is a device by which a payee or an indorsee may part with the possession of an instrument, but not with the legal title to it. Mr. Daniel instances, "Pay to A B, or order, if he arrives at 21 years of age," or "Pay to A B, or order, unless before payment I give you notice to the contrary," as examples of conditional indorsements, the former being an indorsement

[36] Chit. Bills, 235; also Pike v. Street, Moody & M. 226.

[37] Lomax v. Picot, 2 Rand. (Va.) 260.

[38] Frazer v. D'Invilliers, 2 Pa. St. 200; Hannum v. Richardson, 48 Vt. 508; Dumont v. Williamson, 18 Ohio St. 516; Challiss v. McCrum, 22 Kan. 157.

[39] Russell v. Ball, 2 Johns. 50; Borden v. Clerk, 26 Mich. 410.

[40] Rice v. Stearns, 3 Mass. 225.

[41] Fassin v. Hubbard, 55 N. Y. 465.

upon a condition precedent, and the latter one upon a condition subsequent.[42] These conditional indorsements have not come very often before the courts, but they are recognized as a distinct class. It may be said, by way of criticism, that in them commercial convenience has overridden the strict theory of negotiability. This theory would not permit to exist a condition which charged every subsequent indorsee with the duty of seeing whether the condition had been fulfilled before he could legally own the instrument. For, certainly, with the conditional indorsement, as well as with the conditional bill or note, it would be a most effective restriction to circulation as a medium of payment. With this criticism in mind, it is well to note the authority usually referred to as the leading case upon the subject,—Robertson v. Kensington.[43] There this indorsement was made upon an ordinary draft: "Pay the within sum to Messrs. Clark & Ross, or order, upon my name appearing in the 'Gazette' as ensign in any regiment of the line within two months from date." This was transferred to bona fide holders, and the acceptors paid the bill on its maturity to one of these. In the meantime the indorser's name had never appeared in the Gazette as an ensign, and he brought suit as the payee of the bill against the acceptors who had accepted the bill after this condition had been indorsed upon it. And it is to be inferred from the report of the case, that the court decided that such an indorsement was only a conditional transfer of the absolute interest in the bill, and, its condition never having been performed, the transfer was defeated. As appears from the cases, the point emphasized is that the condition operates as notice, and, being merely a notice, it does not destroy the negotiability of the bill or note. Thus, where a note in usual form had these words upon it, signed by the makers, "The within obligation is to be delivered to the payees of the note as a consideration for a judgment which was to be assigned to the makers,"[44] the court properly said the words were no part of the note. Their effect was only to show the consideration, and to operate as a notice to any person who might purchase the note. By this was meant that it was the intention of the parties that it

[42] Daniel, Neg. Inst. § 697.

[43] Robertson v. Kensington, 4 Taunt. 30.

[44] Sanders v. Bacon, 8 Johns. 485; Tappan v. Ely, 15 Wend. 365

was not to affect the original contract. And in cases of conditional indorsement, when it is not the intention of the original parties that the main instrument should be contingent, the act of the conditional indorser is not to be understood as operating to change the main instrument. The terms of the face of the instrument still remain an absolute negotiable order or promise of payment to some one. That some one might in turn negotiate the bill or note to some one else, who in his turn might continue his negotiation until it came to the conditional indorser. But he, on parting with it, having the right of property in himself, might make a special contract which would be distinct from the contract embodied on the face of the instrument. And the only purpose and result of this contract would be to notify every holder subsequent to himself, and the maker or acceptor, when the time for the payment of the instrument arrived, that he as an indorser parted with the instrument upon the understanding that his ownership of it was not to cease until some stated condition was fulfilled. As between the immediate indorser and indorsee, there can be little doubt that this is a correct and proper rule. As to them the contract of indorsement is but an ordinary contract, open to all objections and defenses to which other contracts are open. Some of these objections and defenses may even be shown by parol evidence.[45] This is because the contract consists partly of the written indorsement, partly of the act of delivery of the bill to the indorsee, and partly of the mutual intention with which the delivery is made by the indorser and received by the indorsee.[46] But when the question is not one between the immediate indorser and indorsee, but between that indorser or indorsee and third parties holding in good faith and for value, it becomes much more embarrassing. It is clear that parol evidence or evidence of intention cannot be allowed to ingraft a condition

[45] Bookstaver v. Jayne, 60 N. Y. 146; Sawyer v. Chambers, 44 Barb. 42. See Daniel, Neg. Inst. §§ 717, 723, as to classification of defenses which may be shown by parol evidence. Benedict v. Cowden, 49 N. Y. 396; Hartley v. Wilkinson, 4 Maule & S. 25; Cholmeley v. Darley, 14 Mees. & W. 343; Leeds v. Lancashire, 2 Camp. 205.

[46] Bruce v. Wright, 3 Hun, 548; Benton v. Martin, 52 N. Y. 570; Prentiss v. Graves, 33 Barb. 621; Ocean Bank v. Dill, 39 Barb. 577.

upon the instrument such that it will affect third parties.[47] But where the indorsement is in writing, the rule is so far settled that the maker or acceptor and probably prior parties are bound to take notice of the title of the indorsee, and having such notice, they pay the instrument to him or to subsequent parties at the risk of repayment to the conditional indorser, if the condition is unfulfilled.[48] But, on the other hand, the conditional indorser cannot restrict the negotiability of the instrument and prevent its further indorsement by his indorsee.[49] The terms of the original instrument making it negotiable prevail, and persons other than the conditional indorsee may take it subject to the notice of the condition. And though there is little, if any, authority upon the point, still it may be assumed that in the absence of an express warranty no other than a conditional warranty of title in the subsequent indorser would be implied.[50] There seems to be no reason why the other implied warranties should not remain a part of the contract. But the notice of a conditional title with which the subsequent purchaser of the instrument would be charged would seem to expressly except warranty of title from the obligations of the indorser.

Restrictive Indorsement.

The last of these peculiar classes of indorsements originating in the needs of commerce is the restrictive indorsement. It is of two kinds. The first and commonest variety, and the one which is generally spoken of by the text writers as the restrictive indorsement, is that where the holder deputes to some other person the business of collecting the bill; the other where the holder indorses the instrument to one person for the use or benefit of, or as the trustee of, another. Upon an indorsement of the first kind the instrument is no longer negotiable; the second variety of indorsement does not, however, restrict its circulation. Examples of the first species of indorsement are indorsements "For deposit" [51] or indorsements "For

[47] Byles, Bills, p. 155; Willse v. Whitaker, 22 Hun, 242.

[48] Robertson v. Kensington, 4 Taunt. 30; Savage v. Aldren, 2 Starkie, 232.

[49] Soares v. Glyn, 8 Q. B. 24; s. c. 14 L. J. Q. B. 313.

[50] Mandeville v. Newton, 119 N. Y. 10, 23 N. E. 920.

[51] Johnson v. Donnell, 90 N. Y. 1.

collection," [52] the indorsement for deposit implying no authority even to receive payment of the bill or note, and that for collection meaning that the holder takes no title to it and can transfer none, but can merely present it and receive the money upon it.[53] In construing these and other cases like them, such as "Pay to A or order for account of B," [54] or "Pay to A for my use," [55] or "Pay to A for me," [56] or "Pay to my steward and no other person," or "Pay to my servant for my use," [57] the courts have been governed by two principles. The first and most important is the reason that the natural construction of such a form of words is that it implies a mere authority to receive the money called for in the instrument for the use of the indorser himself, or according to his directions. It therefore vests a mere agency in the indorsee and shows that he, at least, did not give a valuable consideration for the bill or note and is not therefore its absolute owner. It follows from this that the restrictive indorser, in creating such an agency, did not intend to pass the title to the indorsee, but rather to retain it in himself. And hence, there being no intention to transfer, the instrument cannot be negotiated through the indorsement.[58] The second is the reason that the restrictive indorsement, like the conditional indorsement, operates as notice both to the persons called upon to pay the instrument and those who might acquire it after the indorsement as purchasers. No subsequent purchaser could take the instrument in good faith, because whoever reads the indorsement, as it would be every purchaser's legal duty to read it, must see that its operation was limited. Such a purchaser must see that the object

[52] National City Bank of Brooklyn v. Westcott, 118 N. Y. 468, 23 N. E. 900.

[53] Sigourney v. Lloyd, 8 Barn. & C. 622; White v. Miners' Nat. Bank, 102 U. S. 658.

[54] In Treuttel v. Barandon, the defendants took from the agent of the plaintiffs a bill thus indorsed, "Pay to J. P. De Roure, or order, for account of Messrs. Treuttel & Wurtz," and received it expressly by way of security, and not of deposit. It was held that the defendants had sufficient notice that such bill was not the property of De Roure, the plaintiffs' agent. 8 Taunt. 100.

[55] Lloyd v. Sigourney, 5 Bing. 525.

[56] Williams v. Potter, 72 Ind. 354.

[57] Edie v. East India Co., 2 Burrows, 1221.

[58] Hook v. Pratt, 78 N. Y. 371.

of the indorser was to prevent the money received from being applied to the use of any other person than himself. And therefore, to whomsoever the money might be paid, it would be paid in trust for the indorser, and wheresoever the instrument traveled it carried that trust on the face of it.[59] But there is a class of so-called restrictive indorsements which has a very different construction at the hands of the courts. The words in which these indorsements are framed are such as "Pay to A or order for the use of B," [60] and "Pay to the order of A for the benefit of B." [61] The meaning of these words is declared to be that on making such an indorsement the indorser intended to part with his whole title to the instrument. At least there is nothing in the words themselves to negative such a presumption. And it perhaps is the case, though it is not so expressly stated, that, unless there was some expression negativing this idea, the words "or order," taken with the fact of the indorsement itself, would be an evidence of intendment to part with the title. However this may be, the courts have declared the meaning of the words "for the use" and "for the benefit" to mean that the indorser vested the indorsee with the title of the bill not for the benefit of the indorser, but for the benefit of some one else. So that the indorsee was a trustee for that other person, and could not pass off the bill for his own debt. For this reason the indorsement must be presumed to have been made upon a consideration. And being thus a transfer, with its operation limited to the right of the indorsee to apply its proceeds to the benefit of some person other than himself, the instrument could in turn be transferred, and so the paper continued negotiable. And because it was negotiable it was a pledge of the credit of the restrictive indorser. Although these reasons cannot be given upon the weight of authority, still they are probably sound ones. It is settled that an

[59] Lloyd v. Sigourney, 5 Bing. 525. In this case the indorsement was to this effect: "Pay to S. W., or order, for my use. Henry Sigourney." It was held that such indorsement was restrictive, and was sufficient to put a purchaser of such bill upon inquiry, since it indicates that the holder is simply acting as the agent for the one for whose use he is holding. Treuttel v. Barandon, 8 Taunt. 100; Ancher v. Bank of England, 2 Doug. 637.

[60] Evans v. Cramlington, Carth. 5, affirmed, in the exchequer chamber, 2 Vent. 309.

[61] Hook v. Pratt, 78 N. Y. 371.

indorsement "Pay to A" does not restrict the negotiation of the instrument, because the intention of the original parties to make the instrument negotiable prevails over the absence of words of negotiability in the indorsement.[62] And for the same reason, with these forms of words the instrument should continue negotiable unless it expressly appears from the contract between the indorser and indorsee that the indorser intended to absolve himself from liability as an indorser and to destroy the effect of the general rule that the indorsee, having possession of the instrument, was its owner. And lastly it must be admitted that, while these seem the sound and true views of the case, they are not the doctrines commonly found in the text-books, and the student in fixing them in his mind must observe that the weight of authority is to the contrary.[63]

NATURE OF INDORSEMENT.

65. The nature of an indorsement is as follows. It is:

(a) A contract which the indorser assumes with his indorsee and subsequent holders that, if the drawee, acceptor, or maker fails to honor the bill or note, he will, upon the performance of certain conditions imposed by the law merchant, indemnify the holder for all loss incurred by reason of the dishonor of the bill or note.

(b) A transfer of the title to the instrument.[64]

Perhaps the most important aspect of the indorsement is that it is a distinct contract. It gives it all the effect of a new instrument as against the indorser, though it does not in fact create a new instrument. Every indorser of a bill is a new drawer, and it is a part of the inherent property of the original instrument that an in-

[62] Edie v. East India Co., 1 W. Bl. 295, 2 Burrows, 1216; More v. Manning, Comyn, 311; Leavitt v. Putnam, 3 N. Y. 494.

[63] Daniel, Neg. Inst. §§ 698, 699; Edw. Bills & N. § 395; Tied. Com. Paper, § 268; Rand. Com. Paper, §§ 724–727. See, contra, 2 Ames, Bills & N. p. 837.

[64] 2 Ames, Bills & N. p. 837.

dorsement operates as against the indorser in the nature of a new drawing of the bill by him.[65] The first legal fact of the theory with which the student should familiarize himself is that, from the form of words which we have already given as common methods of indorsement, the courts have created a peculiar class of rights and liabilities. The main terms of the contract are found on the face of the bill or note. In the illustrations under §§ 12 and 13, for example, the main terms were an order or promise to pay at a given time and place a certain sum of money, either to some specified person or to such person as he might direct. The indorser in his contract adopts and ratifies each of these terms, and makes them the main terms of his own contract. This idea will perhaps be made more clear by saying that if, in the illustration under § 13, John Smith had indorsed the note: "Pay to John Jones. [Signed] John Smith,"—John Jones could negotiate it further, despite the indorsement was not in the negotiable form of "Pay to Jones, or order." This is because, by the terms on the face of the instrument, the maker, Thomas Robinson, had promised to pay "to order." This means that he had put into circulation a promise to pay money not only to John Smith, but to any one who might legally hold the instrument. And, except in case of John Smith's making a restrictive indorsement to an agent without intention on his part to transfer title, the indorsement of John Smith would be construed only as an adoption of the promise of Thomas Robinson, which was that the note might pass from hand to hand ad infinitum, until Robinson paid it.[66]

But there is more embodied in the contract of the indorser than the terms which are found in the face of the instrument. And these are the terms which are implied in and made a part of the contract by the law. As we have seen, a part of the contract of the indorser is that it is a contract of indemnity.[67] The right to this indemnity accrues only upon the fulfillment of certain conditions

[65] Penny v. Innes, 1 Cromp. M. & R. 439; McCamant v. Miners' Trust Co. Bank, 15 Wkly. Notes Cas. (Pa.) 122.

[66] Leavitt v. Putnam, 3 N. Y. (3 Comst.) 494; Edie v. East India Co., 1 W. Bl. 295, 2 Burrows, 1216.

[67] Byles, Bills, p. 154; Edw. Neg. Inst. § 384; Story, Prom. Notes, § 135.

which are conditions precedent to its enforcement.[68] It is not, like the guaranty of payment, for instance, payable absolutely, primarily, and forthwith. The indorser is in law a new drawer of the bill and a new maker of the note.[69] In either instance with reference to his indorsee he stands precisely in the position of the drawer of the bill or the maker of the note. If the instrument be a bill he may be supposed to have assets in the hands of the drawee and to give the indorsee an order for the payment of them. In the case of a note the considerations existing between the payee and the maker may be supposed to exist between him and his indorsee. But he does not make any contract affecting the liability of his general funds until the considerations existing between the original parties have failed. By this is to be understood that by the mere non-payment of the instrument in the first instance the indorser breaks no contract, because his contract is separate and apart from that of the original parties.[70] The contract which the law puts into his mouth when he writes his name on the back of the instrument is payment on his

[68] Musson v. Lake, 4 How. (U. S.) 262; Cuyler v. Stevens, 4 Wend. 566; Cayuga Co. Bank v. Warden, 1 N. Y. 413.

[69] Aymar v. Sheldon, 12 Wend. 439. In this case the following was held: No principle seems more fully settled or better understood in commercial law, than that the contract of the indorser is a new and independent contract, and that the extent of his obligations is determined by it. The transfer by indorsement is equivalent in effect to the drawing of the bill. In Gwinnell v. Herbert a distinction is drawn between a bill and a note, to the effect that on a bill each indorser is a new drawer, but the drawer is liable only on default of the acceptor, while the maker of a note is liable in the first instance. So, if each indorser became a maker, he also would be liable primarily. 5 Adol. & E. 436. Holbrook v. Vibbard, 2 Scam. (Ill.) 465; Belford v. Bangs, 15 Ill. App. 76.

[70] In Rothschild v. Currie, it was held that the indorser contracts to pay not primarily or absolutely, but on two conditions: dishonor by drawee or acceptor; and due notification to himself of such dishonor. Being in law a new drawer of the bill, the same state of things is supposed to exist between him and the indorsee, as the law supposes between the drawer and payee. 1 Q. B. 43. In Matthews v. Bloxsome, 33 Law J. 209, the defendant intending to become surety for A, put his name at the back of a blank bill stamp. The bill was then filled up by plaintiffs as drawers, payable to their own order. As he gave authority to fill out the bill, the defendant was in the same position as an indorser after the bill had been drawn, and might be treated as a new drawer. 33 Law J. Q. B. 209.

part according to the terms of the original instrument, with the added conditions of due presentment, dishonor, and notice of dishonor. His contract therefore is that his general funds are liable according to the original terms of the instrument and indemnity for their breach, provided there have been due and proper presentment, dishonor, and notice of dishonor by the holder.[71]

As a Transfer.

The last general element of an indorsement is that it is a transfer of the title to the instrument. It is sufficient here to say, in general terms, that by this is meant nothing more than that it is a mere purchase and sale of a piece of property. The indorser or transferer is viewed in many respects as a vendor, and the indorsee or transferee as a vendee. It is, of course, not tangible property, but a chose in action, and as such transferee or vendee the indorsee merely purchases the rights of the indorser. What these are, and the legal relation of the indorsee to the various parties to the instrument, will be considered hereafter.

REQUISITES OF INDORSEMENT.

66. The requisites of an indorsement are as follows:

(a) It must follow the tenor of the bill or note.

(b) It must be by the payee or a subsequent holder.

(c) It is only complete upon delivery.

Following Tenor of Instrument.

The tenor of a bill or note has already been explained, under § 43. The same reasons require that the indorsement follow the tenor of the original instrument that require that the acceptance follow it. The indorser as well as the acceptor, may not alter the amount of money[72] obligated in the instrument to be paid, nor the

[71] Mt. Mansfield Hotel Co. v. Bailey, 64 Vt. 151, 24 Atl. 136; Id., Johns. Cas. Bills & N. 109; May v. Coffin, 4 Mass. 341; Warder v. Tucker, 7 Mass. 449; Bryant v. Faries, 15 Ill. App. 414.

[72] Hawkins v. Cardy, 1 Ld. Raym. 360. In this case it was shown that Cardy drew a bill for £46. 19s., payable to B or order, and that B indorsed £43. 4s. of it payable to plaintiff. It was held by the court that the note was such a personal contract as not to be capable of apportionment. Planters' Bank of Tennessee v. Evans, 36 Tex. 592.

time,[73] place, nor manner of payment. If, for instance, the indorser promised to pay part of the sum called for in the original instrument to one person, and part to another, it would amount to an apportionment of the contract, and the acceptor or maker would thus, by the indorser's act, be liable to two actions where, by the terms of the original contract, he was liable to but one.[74] Were the rule otherwise, the indorser would be empowered to make a contract for the maker or acceptor without his assent,—a reductio ad absurdum. But this does not mean that, when an instrument has been paid in part, a receipt for the amount paid may not be written on its back, and the indorser may not transfer the balance,[75] nor that a note may not be transferred to two or more persons, who hold it in co-ownership as a joint right,[76] nor that an instrument may not be indorsed to a third person as collateral security for a claim equaling but part of the amount called for in the instrument itself.[77] All these are perfectly proper courses, because they transfer but one right of action. The test is, does the transfer cut up the right of action, or vary it, or invest different persons with different rights of action against different parties to the instrument. If it does, the indorsement is void as such.

It is sometimes argued that a writing on the back of the instrument, in the form of words of a guaranty, corresponds to and follows the tenor and purpose of the instrument, and that for this reason it is a form of indorsement. But the better opinion is that its legal effect is what it purports to be,—a form of a special contract. A guaranty in general terms, such as "I warrant the collection of the within note, for value received," does not authorize a suit against guarantor by a subsequent holder of the note. This is not an indorsement. It is not even transferable with the instru-

[73] In Smallwood v. Vernon, 1 Strange, 478, it was held that an indorser might charge himself to pay at a different time from that specified in the note, though he could not lay a charge upon the maker of a note, differing from the terms of such note. If a note were payable May 1st and it was indorsed payable April 1st, this would make it a promissory note payable, as to the indorser, April 1st.

[74] Douglass v. Wilkeson, 6 Wend. 637.

[75] Id.

[76] Flint v. Flint, 6 Allen, 36; Conover v. Earl, 26 Iowa, 167.

[77] Reid v. Furnival, 5 Car. & P. 499.

ment itself. It is a special contract, which can be enforced only in the name of and by the person with whom the contract was made. The fact of the guaranty being in terms negotiable does not change its character.[78] For where the guaranty was in form, "I sell, assign, and guarantee the payment of the within note to John Allen, or bearer," and the instrument upon which this guaranty was written was itself negotiable, then, so far as the guarantor is concerned, the words were still construed as a guaranty not within the privileges of negotiability. In such case the debtor must seek the creditor. As regards the maker of the note, and to render him liable, no demand is necessary, and the guarantor is entitled to no notice of the failure of the maker or acceptor to pay the instrument.[79] But, although such a guarantor lacks these privileges, his guaranty still passes with the instrument, and vests whomsoever may hold the note with right to sue upon it.[80] It amounts, in fact, to an indorsement with a waiver of these privileges we have specified; yet the student must be careful in these respects to remember that it is not an indorsement. Though this proposition is subject to much confusion, arising from the position taken by the courts of some jurisdictions that written words in form of a guaranty may be treated as an indorsement, if it can be shown by extrinsic evidence that such was the intention of the parties, it is a doctrine wiser and more consistent with the theory of negotiability, and more for the benefit of subsequent indorsers, that a written contract of one kind should not be turned into a contract of a different kind by parol proof concerning the intention of the parties; and the indorser of an instrument should not, under certain circumstances, be charged sometimes as an indorser and sometimes as a guar-

[78] Lamourieux v. Hewit, 5 Wend. 307; McDoal v. Yeomans, 8 Watts, 361; Belcher v. Smith, 7 Cush. 482; Trust Co. v. National Bank, 101 U. S. 68. See, contra, Judson v. Gookwin, 37 Ill. 286; Partridge v. Davis, 20 Vt. 499; Barrett v. May, 2 Bailey, 1; McLaren v. Watson's Ex'rs, 26 Wend. 425.

[79] Vyse v. Wakefield, 6 Mees. & W. 442; Walton v. Mascall, 13 Mees. & W. 72.

[80] Allen v. Rightmere, 20 Johns. 364; Ketchell v. Burns, 24 Wend. 456; Prosser v. Luqueer, 4 Hill, 420; Hough v. Gray, 19 Wend. 202. For further authorities upon guaranty, see Bissell v. Gowdy, 31 Conn. 47; Springer v. Hutchinson, 19 Me. 359; Taylor v. Binney, 7 Mass. 479; Partridge v. Davis, supra.

antor. Such principles are subversive of the certainty necessary for circulating mediums.*

Who may Indorse.

The requisite of an indorsement next in importance to its being according to the tenor of the instrument is that it be by the payee or a subsequent holder. The sense of this rule is, however, restricted. As we shall see in the next section, it is limited in its application to instruments payable to order. It is also limited in that a person who is not a holder or owner of the instrument in any sense, but who puts his name upon it merely to support its circulation by his credit, may be an indorser.[81] All that we would here say is that in case of instruments payable to order the payee must be in the first instance the first indorser.[82] This is because of several reasons. The first is that the property of the instrument is in the payee. Until he indorses it, the legal title is not transferred.[83] Mere possession by some one else of the instrument unindorsed does not entitle that other person to the full rights of a bona fide purchaser, and if the maker or acceptor pays it to such person, it is at the risk of possible re-payment.[84] But this rule is not universal in its application. An indorsement is only necessary to transfer the

* Spies v. Gilmore, 1 N. Y. 321.

[81] An infant who is holder or payee of a note or bill may transfer it by indorsement. Hardy v. Waters, 38 Me. 450, Johns. Cas. Bills & N. 152; Spencer v. Allerton, 60 Conn. 410, 22 Atl. 778; Id., Johns. Cas. Bills & N. 120; Bank of Jamaica v. Jefferson, 92 Tenn. 537, 22 S. W. 211; Id., Johns. Cas. Bills & N. 126. As holding that an indorsement by another than the payee partakes rather of the nature of a guaranty, see Boynton v. Pierce, 79 Ill. 145; Cushman v. Dement, 3 Scam. (Ill.) 497; Croskey v. Skinner, 44 Ill. 321; Smith v. Finch, 2 Scam. (Ill.) 321.

[82] Cock v. Fellows, 1 Johns. 143; Prevot v. Abbott, 5 Taunt. 786. In this case the plaintiff averred delivery to him by the defendant, and also the facts of acceptance, presentment for payment, and dishonor. Judgment for plaintiff was arrested after verdict for the reason that indorsement by the defendant had not been averred. Pease v. Hirst, 10 Barn. & C. 122; Freeman v. Perry, 22 Conn. 617; Newman v. Ravenscroft, 67 Ill. 496; Woodbury v. Woodbury, 47 N. H. 11; Lewis v. Hathman, 7 Ind. 585; Titcomb v. Thomas, 5 Greenl. 282; Pease v. Dwight, 6 How. (U. S.) 190.

[83] Ellis v. Brown, 6 Barb. 282.

[84] Doubleday v. Kress, 50 N. Y. 410.

legal as distinguished from the equitable title to the paper. If by mistake, accident, or fraud, the indorsement has been omitted, when it was intended that the indorsement should be made, the payee may be compelled by a court of equity to make the indorsement. Meantime the transferee holds the bill or note under the same rights that he would have acquired under the assignment of paper not negotiable. In other words, he is the beneficial owner, and has those rights and only those rights against prior parties which the payee or his assignor might have,—and every equitable defense available against them is available against him.[85] This rule applies to subsequent holders of instruments through unindorsed indorsements in full, both in relation to the transfer of title and to laying the instrument open to equitable defenses. In cases of indorsements in full, the indorsee in such indorsement named must for the same reasons himself indorse the instrument. In no other way will the transfer convey the legal title to the holder, so that he can at law hold the other parties liable to him. The second reason rests upon the theory that the liability of indorsers to each other is regulated by the position of their names. This reason also is restricted in its application. To this rule, too, the accommodation indorser, who has not owned the paper, and to whom no such transfer has been made, is also an exception.[86] Although, of course, where the second accommodation indorser of an instrument has paid and taken it up, he becomes a holder for value, and may compel the first accommodation indorser to pay him, although both are accommodation indorsers.[87] The rule in its first aspect means that the contract which each indorser makes when he indorses the paper is, that he is liable to every subsequent indorsee, and that every antecedent party is liable to him. The liability is several. It is successive. And the object of the rule in its first aspect is only to

[85] Harrop v. Fisher, 9 Wkly. Rep. 667, 10 C. B. (N. S.) 196; Hedges v. Sealy, 9 Barb. 214; Freund v. Importers' & Traders' Nat. Bank, 6 Thomp. & C. 236; Woodworth v. Huntoon, 40 Ill. 131, Johns. Cas. Bills & N. 150; Minor v. Bewick, 55 Mich. 491, 22 N. W. 12.

[86] Easterly v. Barber, 66 N. Y. 433; Greusel v. Hubbard, 51 Mich. 95, 16 N. W. 248; Brewer v. Boynton, 71 Mich. 254, 39 N. W. 49.

[87] Kelly v. Burroughs, 102 N. Y. 93, 6 N. E. 109; Holloway v. Quinn, 18 Wkly. Notes Cas. 284.

maintain these indorsements in the regular order of their liability. It does not go further than this. Thus where [88] A made a note payable to B or order, and B afterwards indorsed the note to C, who afterwards indorsed it to B again, the court, upon suit by B against C, refused a recovery because it was a prior indorser calling upon a subsequent one; and the inference of the decision is that this course was not allowed because it involved circuity of action. A prior holder, if he be an indorser, cannot again be an indorser, because he has no remedy against the intermediate parties, for they would have their remedy over against him, and the result would be to place the parties in precisely the same situation as before any action at all.[89] The second aspect of the rule is that when an indorser is some person other than a subsequent holder, if he be not a double indorser, he is either an indorser or else is not liable at all, or, if liable, he is either a guarantor or a joint maker.[90] This phase it is purposed to discuss in the next section.

Necessity for Delivery.

As in the case of the inception of the original contract rights under the principal terms of the instrument, and also under the acceptance, an indorsement requires delivery.[91] And the rules and reasons relating to the delivery of an indorsed instrument by the payee or indorser are in most respects the same as those already given relating to the delivery of bills and notes and of acceptances. The negotiation of the instrument begins with the act of indorse-

[88] Bishop v. Hayward, 4 Term R. 470.

[89] In Wilders v. Stevens, a bill was drawn by plaintiffs to their order, on J. H., and that it was then indorsed by plaintiffs to defendant and by defendant to plaintiffs. It was claimed that circuity of action would arise from such indorsement. It was shown in the pleading that the indorsement by the defendant was to make him liable as surety, and the court held that, inasmuch as the defendant could not sue the plaintiff, the objection as to circuity being removed, the plaintiffs might recover from the defendant. 15 Mees. & W. 208. See Bishop v. Hayward, supra.

[90] Bank of Jamaica v. Jefferson, 92 Tenn. 537, 22 S. W. 211; Id., Johns. Cas Bills & N. 126.

[91] Spencer v. Carstarphen, 15 Colo. 445, 24 Pac. 882; Id., Johns. Cas. Bills & N. 117; Pardee v. Lindley, 31 Ill. 174; Richards v. Darst, 51 Ill. 140; Badgley v. Votrain, 68 Ill. 25; Kyle v. Thompson, 2 Scam. 432.

ment as distinguished from the intention of the parties to indorse,[92] and is consummated by the delivery of the instrument and its acceptance with the intention to pass and vest title. On these simple acts the whole contract rests. The law prima facie presumes the other elements of contract. For example, delivery once being made and the title having once passed, these facts of themselves import a consideration.[93] Possession of the instruments obviates the necessity of pleading delivery, non-delivery being wholly a matter of affirmative defense.[94] And the term "indorsed" in pleading includes delivery for value to the indorsee.[95] But both indorsement and delivery must concur in the transfer.[96] The indorsement without delivery is nothing, although the indorser has in fact signed his name and the indorsee knows that it is signed. Still the con-

[92] Goshen Nat. Bank v. Bingham, 118 N. Y. 349, 23 N. E. 180.

[93] Hook v. Pratt, 78 N. Y. 371; Durham v. Manrow, 12 N. Y. 533; Ketcltas v. Myers, 19 N. Y. 231; Russell v. Whipple, 2 Cow. 536; Chappell v. Bissell, 10 How. Prac. 274; Marshall v Rockwood, 12 How. Prac. 452.

[94] Peets v. Bratt, 6 Barb. 662; Lafayette Ins. Co. v. Rogers, 30 Barb. 49.

[95] In the case of Marston v. Allen, 8 Mees. & W. 494, one Harrop, a bank accountant, drew a bill payable to himself upon defendant, who was indebted to the bank, which was accepted by defendant. The bill was signed on the back by Harrop and given to W. Marston, another employé, to keep for the bank. It was testified by E. Marston that he received this bill, for value, from W. Marston, and that he had indorsed and delivered it for value to the plaintiff. It was held that the indorsement and delivery of the bill to W. Marston was not to him as indorsee, and was consequently not such indorsement as to transfer the bill. In Adams v. Jones, a bill drawn on and accepted by defendant was indorsed in blank by J. F. and delivered to plaintiff to deliver to R. The defendant, being acceptor, was notified by R. not to pay to plaintiff, and refused payment. On the action in assumpsit being brought, it was held that plaintiff had no title to sue, but that he held the bill only as the servant of R. 12 Adol. & E. 455. Federick v. Winans, 51 Wis. 472, 8 N. W. 301; Higgins v. Bullock, 66 Ill. 37; Freeman's Bank v. Ruckman, 16 Grat. 129; Dann v. Norris, 24 Conn. 333.

[96] In Buckley v. Hann, the action was upon a bill drawn by W. and indorsed to plaintiff, and it was shown that the bill was drawn and accepted and W.'s name signed upon it, and that it was then sent to plaintiff, who lived some distance from London, W.'s residence. Under the statute requiring that the whole cause of action must arise in the city it was held that the action could not be maintained, since indorsement was inoperative without delivery. 5 Exch. 43.

tract so far as it has gone may be revoked by the indorser, and the indorsement countermanded,[97] unless some contract right other than that of the indorsement itself exists in the indorsee. The delivery must be by the indorser, otherwise the transfer of the instrument is not by his order. His executor or administrator even cannot make delivery, although the payee before his decease has written his name upon it.[98] So, too, if a transferee of a bill or note send it back to his indorser, refusing to accept it, this is a refusal of an offer, and his subsequently getting possession of the instrument without the assent of the indorser will not invest him with title, because there was then no intention to contract present between them and hence no contract.[99]

ANOMALOUS INDORSEMENTS.

67. A person whose name is on the back of a bill or note, transferable by delivery, or payable to bearer, is to be deemed an indorser.

68. A person signing on the back of a bill or note payable to order before the payee is prima facie presumed to be a second indorser, and not liable to the payee; but this may be rebutted by showing that his indorsement was given to give the maker credit with the payee, and he thus becomes liable as first indorser, the payee being permitted to indorse to him without recourse.

These two rules instance the commonest forms of irregular indorsements. The first raises the question of the legal effect of an indorsement upon an instrument payable to bearer by a person

[97] Brind v. Hampshire, 1 Mees. & W. 365.

[98] Bromage v. Lloyd, 1 Exch. 32; Marston v. Allen, 8 Mees. & W. 494.

[99] Cartwright v. Williams, 2 Starkie, 340. Thus, in the case of Brind v. Hampshire, one Usher indorsed a bill, payable to himself, to the order of B., and gave it to the defendant to deliver to B. Before this had been done, Usher directed defendant not to deliver the bill. B., knowing the facts, brought action in trover to recover the bill. It was held that the indorsement without delivery was insufficient to give B. the right to maintain the action. There was no binding obligation between plaintiff and defendant, merely an inchoate contract. 1 Mees. & W. 365.

whose name does not otherwise appear as a party to the contract;[100] the second, the legal effect of an indorsement upon an instrument made payable to a specific payee, but indorsed before the payee has indorsed and transferred the instrument. In this last question the explanation is complicated by the fact that, in strict legal theory, the indorsee would have no place either in the transferring the instrument or incurring liability. The payee would transfer and incur liability to his immediate indorsee, and the irregular indorser would thus be eliminated from the instrument entirely.

In both of these cases the underlying principle is the same,—to effect the intent of the parties, and to treat each case as an indorsement.[101] If a person puts his name on the back of an instrument at the time it is made, either because he promises to become responsible for it, or because he participates in its consideration, he is and ought to be as much liable as if he were in fact a joint maker. If his indorsement is subsequent to the making of the note, and he has nothing to do with the original consideration but puts his name on the note to add to the security, he is and ought to be as much

[100] In Moore v. Cross, it was held that where a party has indorsed a note payable to some third person or order, though simply for the accommodation of the maker, he is liable as an indorser to such third person. 19 N. Y. 227. In Boynton v. Pierce, the name of defendant was indorsed on note, there being no evidence on its face that he had any connection with the instrument. It was held the defendant was presumptively a guarantor, but also held that this presumption was rebuttable, and that it might be shown that such blank indorsement was simply a guaranty of collection, or that defendant was only an indorser. 79 Ill. 145. Burpee v. Smoot, 4 Wkly. Notes Cas. (Pa.) 186.

[101] In the case of Seabury v. Hungerford, an action was brought on a promissory note on the back of which was the following: "John I. Hungerford, backer, Schoharie." It was held that, such indorsement being only to secure the payee, the indorser was liable as such only, and not as maker or guarantor. "This was, in legal effect, regular mercantile paper, upon which the defendant contracted the obligation of an indorser, * * * and by that obligation, and no other, he is bound. * * * The only inference is that he intended to give the maker credit by becoming answerable as indorser." Bronson, J., in Seabury v. Hungerford, 2 Hill (N. Y.) 80. See, also, Sylvester v. Downer, 20 Vt. 355; Miller v. Pollock, 99 Pa. St. 206. As to joint maker, see Herbage v. McEntee, 40 Mich. 337; Moynahan v. Hanaford, 42 Mich. 329, 3 N. W. 944; Barron v. Cady, 40 Mich. 259.

liable as if in fact he had been a guarantor. Therefore, in case of instruments payable to bearer, or to a particular person or bearer, or to a particular person or order, and indorsed in blank, all of which pass by delivery, such a person is to be deemed responsible as an indorser,[102] because the inducement and intent of such a writing was plainly nothing else and could have no other meaning in mercantile law than to make such a person liable as indorser in case of the failure of the principal after the holder had exercised due diligence in attempting the collection. This rule applies to the payee where he indorses and delivers over a note or bill so indorsed. He is entitled to all the privileges of a first indorser, as between himself and the indorsee.[103]

In New York, in case of instruments made payable to the order of a specific person, a curious device has been adopted for carrying into effect the intention of the parties. The problem was to overcome the legal presumption from the face of the note that such an indorser stood in the position of a subsequent indorser to the payee. So far as the paper showed the record of the transaction, such an

[102] In the case of President, etc., of Union Bank v. Willis, an action was brought on a note, payable to W. or order, made by T. M.'s name was on the back in blank, and under it was W.'s name, also in blank. T. presented the note to a bank, and it was discounted. T. failed to pay, and notice was given to W. and M., but the note was not presented to M. for payment. In a suit by the bank against W. as indorser, it was held that T. and M. stood in the relation of joint and several promisors. The defendant was an indorser, liable only upon legal notice of a demand upon the promisors and a refusal by them to pay the note. 8 Metc. (Mass.) 504.

[103] Dean v. Hall, 17 Wend. 214; Hill v. Lewis, 1 Salk. 132; Hodges v. Steward, Id. 125. In this case it was held that while an assignment of a bill payable to A B or bearer is no good assignment to charge the drawer with an action on the bill, it is nevertheless a good bill between indorser and indorsee; * * * for the indorsement is in the nature of a new bill. In Nicholson v. Sedgwick, it was held that where a note was payable to A B or bearer, and such note was delivered for value to a third person by A B, the action must be brought in the name of A B. 1 Ld. Raym. 180. In Buller v. Crips, it was held that a promissory note to A B or order would not support an action by indorsee against the maker. 6 Mod. 29. To same effect see Robinson v. Brown, 4 Blackf. (Ind.) 128; Bates v. Butler, 46 Me. 387; Gilbert v. Nantucket Bank, 5 Mass. 97; Thacher v. Stevens, 46 Conn. 561; National Bank v. Dorset Marble Co., 61 Vt. 106, 17 Atl. 42.

indorser could only be presumed to have intended to become liable as second indorser, and could only be regarded as such, and of course not liable upon the instrument to the payee, who was supposed to be the first indorser. The court, construing the instrument before it, was bound to consider the order of its transfer, as, first, from the maker or drawer to the payee; second, an indorsement by the payee to the irregular indorser as his indorsee; and lastly, by the irregular indorser to the subsequent indorsee on the paper. Thus, the payee could not hold such an indorser liable because he was, so far as the paper showed, his indorsee.[104] But the courts soon saw that carrying this doctrine to all lengths would often mean the enforcement of theory at the expense of justice, and of defeating the intent of the parties. The purpose of the irregular or anomalous indorser in making the indorsement, and of the payee in receiving the instrument with such an indorsement, was to enter into a contract of indemnity. The payee took the instrument for value because the indorser's name was there. Hence in such cases the rule was relaxed. The paper itself was held to furnish only prima facie evidence of this intention. It was competent to rebut this presumption by parol proof that the indorsement was made to give the maker credit with the payee. To meet the objection that the payee, in order to complete the chain of transfer, must needs be the first indorser, the payee, as holder, was permitted to indorse the instrument to the accommodation indorser without recourse, and to fill up the blank indorsement of the accommodation indorser to himself. In this way the parties were placed in the same position as if the maker had in the first instance delivered the note to the payee, the payee had then indorsed it without recourse to the accommodation indorser, and the accommodation indorser had then indorsed it to the payee. This, moreover, could be done at any time,—on the trial, or even, if omitted then, on an appeal. The practical effect of this course was to obviate the difficulty raised by the other rule we have just mentioned,—that, where an instrument came into the hands of a person who already appeared upon it as a payee, he could not maintain an action against any of the parties

[104] Herrick v. Carman, 12 Johns. 159; Tillman v. Wheeler, 17 Johns. 325; Bacon v. Burnham, 37 N. Y. 614; Phelps v. Vischer, 50 N. Y. 69.

whose indorsements were subsequent to the first appearance of his name, because each of these persons, on paying him the note, would have an immediate right to demand payment from him on his earlier indorsement. The law in such case, to avoid this circuity, denied him the right of action. But, by the intervention of this device, this defense of circuity was not available against him, because the irregular or anomalous indorser, under his agreement of indemnity with the payee, could have no right of action against the payee, and, the reason failing, the rule itself fell to the ground.[108] It is important to notice that it is incumbent on the payee suing the indorser to show that such indorsement was made by the indorser to give credit to the note, and was taken by him because of such credit. He cannot be silent upon this point, and avail himself of the rule, for the presumption is that such an indorser is a second indorser, and not liable to the payee. The burden is upon the payee to show that, by agreement between the parties, the liability is otherwise.

But these reasons and rules do not prevail throughout the Union; nor do they prevail in England. In the rule just set forth the plain effect of the writing was overcome and contradicted by parol evidence. And many of the courts have not seen fit to flatly defy this rule of evidence. These courts have sought either to distinguish and make the case an exception to this rule of evidence, or to carry out the intention of the parties in other ways. In distinguishing the rule they have made a difference in its application to immediate and to remote parties. Between immediate parties it was thought that the indorsement in blank implied an authority to write over it anything that was in fact agreed upon by the parties. It was therefore perfectly competent both to show by parol evidence what this agreement was, and also, such agreement being shown, for the courts to carry it into effect. If the agreement was

[108] Hall v. Newcomb, 3 Hill, 233, s. c. in error 7 Hill, 416. In this case a promissory note payable to H. was made by F. This was indorsed in blank by N. for the accommodation of F., and knowing that it was the intention of F. to obtain money from H. upon it. H. took the note and supplied the amount desired. N. was held not to be liable to H. as maker or guarantor, but to be liable as an indorser only. Moore v. Cross, 19 N. Y. 227; Coulter v. Richmond, 59 N. Y. 478; Jaffray v. Brown, 74 N. Y. 393.

to indorse, then the writing of the name was to be an indorsement,[106] if to guaranty, then the writing was to be a guaranty;[107] and so likewise in cases of surety or joint maker.[108] But in case of remote parties, the same reason could not obtain. Between them there can be no mutual understanding, and therefore this rule, so far as showing by the words or acts of the parties what was meant by the writing, was rejected.[109] The courts then fell back upon the principle that the business attitude of the party signing must have meant something, and that, assuming this to have been his intention, they will support his act as a contract of some sort, rather than let it fail as a void obligation. This has given rise to a chaos of conflicting authorities, but from out of it the following rules have been classified:[110] In some jurisdictions, it being presumed there was some liability to the payee intended by the person writing his name upon the instrument, it is declared that such liability was that of a maker before delivery and of a guarantor after delivery, or else that such liability was intended to be that of a maker or a guarantor at all times and to all parties, irrespective of the fact when the instrument was delivered. This last position eliminated the question of sole liability to the payee entirely. In other jurisdictions it was assumed that such person was intended to be a second indorser, against whom the payee could have no recovery. And in England it seems the doctrine that such indorser is under no liability at all.[111] It is impossible, in a work of this character, to discuss at length the reasons for these various positions, and compare their merits. All that can be done here is for the student to fix in his mind the general classification, and then, if it is so desired, the doctrine must be followed in each separate state from the authorities referred to.

[106] Eberhart v. Page, 89 Ill. 550; Mammon v. Hartman, 51 Mo. 169.

[107] Camden v. McKoy, 3 Scam. 43; Taylor v. French, 2 Lea, 260.

[108] Rey v. Simpson, 22 How. 341; Walz v. Alback, 37 Md. 404.

[109] Houston v. Bruner, 39 Ind. 383; Whitehouse v. Hanson, 42 N. H. 18.

[110] Cromwell v. Hewitt, 40 N. Y. 491, note, p. 492. The student is referred to this note, and also to the note of Prof. Ames (volume 1, p. 269) to Boynton v. Pierce, for a large number of collated cases, which are the authority for the above statement.

[111] 2 Ames, Bills & N. p. 839, supported by the negative authority, Lecaan v. Kirkman, 6 Jur. (N. S.) 17; Steele v. McKinlay, 5 App. Cas. 754; Gwinnell v. Herbert, 5 Adol. & E. 436.

CHAPTER V.

OF THE NATURE OF THE LIABILITIES OF THE PARTIES.

69. Acceptor and Maker.
70. Facts Which the Acceptor is Estopped to Deny.
71. Facts Which the Acceptor does not Admit.
72–73. Acceptor Supra Protest.
74–76. Drawer and Indorser.
77. Warranties or Facts Which the Drawer is Estopped to Deny.
78. Warranties or Facts Which the Indorser is Estopped to Deny.
79. Indorser without Recourse.
80. Damages against the Acceptor, Maker, Drawer, and Indorsers upon the Bill and upon the Warranties.
81–83. Accommodation Parties and Persons Accommodated.

ACCEPTOR AND MAKER.

69. The acceptor and maker each promises the payee and subsequent holders that he will pay the bill or note according to its tenor at the time of signing.

Under § 55, we commented upon the shifting relations of the holder with the drawer and the drawee or acceptor of a bill before and after acceptance. And in a later section we shall show that the phrase, "The acceptor of a bill and the maker of a note is the principal debtor thereon," means that as against them there is no necessity for presentment at a particular place, or of protest, or of notice of dishonor, and that all parties look to them to eventually pay the instrument. As has been shown, the bill and its acceptance amounts to a transfer to the holder of property of the drawer in the acceptor's hands to the amount of its face value. In technical phrase, there is a direct privity of contract between the holder and acceptor, and at common law an acceptance was evidence of money had and received by the acceptor to the use of the holder.[1] The drawer is presumed to draw upon his funds in the hands of the drawee; the payee is presumed to have given a full value for the

[1] Black v. Caffe, 7 N. Y. 281; Wolcott v. Van Santvoord, 17 Johns. 248.

bill; and, when the drawee accepts the bill, he becomes an immediate debtor to the payee, as upon a valuable consideration paid to the drawer by the payee and by the drawer to the acceptor of the funds in the hands of the acceptor. The acceptor stands in the same relation to the payee as the maker of a note does to the indorsee; and the drawer is regarded in the light of an indorser.

But the student must not identify the acceptor of a bill and the maker of a note further than that they make the same promise to the payee and subsequent holders. Beyond this point they differ. An acceptor enters into a contract relation based upon rights or liabilities accruing to or against the drawer, payee, and perhaps indorsers. The maker can make but one contract, and that is with the payee. All other rights and liabilities arising to or against the makers of notes are merely a transfer of such as the payee himself has. But with the acceptor, there is a call for the adjustment of the conflicting rights of drawer and acceptor, drawer and payee, payee and acceptor, and perhaps of indorsers with each of these parties and with each other prior to the time of acceptance—a body of rights and liabilities distinct from any involved in the making of a note. These will be discussed therefore in the sections next following. All that is meant to say here is that there is no difference in their contract classification between the promise of the maker and acceptor to pay the money called for in the instrument.[2] They are alike, independently of all other contract rights, a prima facie promise to pay the instrument when it becomes due according to the tenor of the instrument.[3]

FACTS WHICH THE ACCEPTOR IS ESTOPPED TO DENY.

70. The acceptor of a bill of exchange, by the acceptance, is estopped from denying to a bona fide holder:

(a) The genuineness of the drawer's signature.

(b) The existence of the drawer.

(c) The capacity of the drawer to make the draft.

[2] Bull v. Sims, 23 N. Y. 570; Fairchild v. Ogdensburgh R. Co., 15 N. Y. 337; Miller v. Thomson, 3 Man. & G. 576; Wardens & Vestrymen of St. James Church v. Moore, 1 Ind. 289; Marion & M. R. R. v. Hodge, 9 Ind. 163.

[3] Hoffman v. National City Bank of Milwaukee, 12 Wall. 181.

(d) His authority to draw for the sum named.

(e) Where the bill is to the payee's order, that the payee was competent to make the indorsement.[4]

What are called the "warranties" of the acceptor are a phase of the legal doctrine of estoppel. "An estoppel," says Lord Coke, "is when a man is concluded by his own act or acceptance to say the truth." And with bills the acceptor is precluded from testifying in the instances given in the principal text. It may well be in case of an acceptor that his drawer had no existence, or that his signature is forged, or that the acceptor had no funds of the drawer in his hands when he accepted the bill. But the legal estoppel shuts out all evidence of these, and thus they cannot be availed of as defenses. From this rule of evidence it is but an easy step to develop a right of quasi contract. The holder of the bill may, perhaps, by the operation of this very rule, and by its operation alone, be enabled to recover the amount of the bill from the acceptor. This being established as a rule of business, it grows to be something more than a mere rule of evidence. With indorsements it becomes a distinct right on which persons may be presumed to act when they discount the instrument. With them it is not inaccurate to speak of these estoppels as warranties, or distinct stipulations created by law and embodied in the contract indorsement.[5]

As between the payee or some subsequent holder, who has taken the bill in good faith, and the acceptor, whose acceptance has given

[4] These rules probably apply to the acceptor supra protest also.

[5] In the case of Bank of Commerce v. Union Bank, it was held that the drawee was presumed to know the handwriting of the drawer, and the payment of a bill by him is an admission which the drawer may not deny as between himself and the holder. Even though such signature is discovered subsequently to be a forgery the drawee cannot recover the amount paid to an innocent holder. This rule is founded on the presumed negligence of the drawee to fail to detect an irregularity in the signature, but does not apply where the forgery is in the body of the bill. Bank of Commerce v. Union Bank, 3 N. Y. 230. And see Wilkinson v. Lutwidge, 1 Strange, 648. Where a forged bill of exchange was accepted and paid by the drawee, he cannot recover back from the indorsee to whom he paid. Price v. Neal, 3 Burrows, 1354. An acceptor for honor does not admit the genuineness of the drawer's signature. Wilkinson v. Johnson, 3 Barn. & C. 428, Johns. Cas. Bills & N. 83.

currency to the bill, the latter must bear the loss, if any arises. He may not give in evidence any of the defenses specified in the principal text.[6] This rule is based on sound business reasons. The acceptor's promise is a distinct and separate one to all parties who, upon the faith of it, have given value, in adjusting the equities between parties. It is more just to hold the acceptor to knowing his own correspondent with whom he has business dealings than to subject every holder who may take a bill in its circulation to loss or danger of loss from parties of whom he knows nothing. When the acceptor and the holder are each innocent, the acceptor, who had the best means of knowledge, is the more negligent of the two, and therefore the equities are against him.

Price v. Neal [7] is usually quoted as the leading case in illustration of this. This was an action on the case by Price to recover from Neal the sum paid him on two bills of exchange, of which Price was the drawee. One of the bills had been paid by Price without a previous acceptance; and the other was first accepted, and, after acceptance, indorsed for value to the defendant, and then paid at maturity. There had been a forgery of the drawer's signature in the case of both bills. Lord Mansfield said: "It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand before he accepted it or paid it; but it was not incumbent on the defendant to inquire into it." This means that it is a just and reasonable rule in the conduct of business to require the acceptor, when the bill is presented for acceptance or payment, to examine the signature of the drawer. He, better than the payee or any innocent third party, can be supposed to know the signature

[6] Where one has made a bona fide purchase for value of a bill of exchange, before it was accepted, or before the drawee knew of its existence, the acceptor will not be estopped from showing that the drawer's signature is not genuine. In this case the acceptors had done nothing to induce the holder to believe that the signature was genuine at the time of his purchase, and consequently he had no right of action against them. McKleroy v. Southern Bank of Kentucky, 14 La. Ann. 458; Hoffman v. Bank of Milwaukee, 12 Wall. 181. As to the responsibility of a bank paying a check upon it for the genuineness of the drawer's signature, see National Bank of North America v. Bangs, 106 Mass. 441; Mackintosh v. Eliot Nat. Bank, 123 Mass. 393; Merchants' Nat. Bank v. Eagle Nat. Bank, 101 Mass. 281.

[7] Price v. Neal, 3 Burrows, 1354.

and handwriting of the drawer,—usually his customer or correspondent. He, rather than such party, should be held to detect the forgery, or to know the fact that he had no funds of the drawer in his hands, or that he had no legal right to enter into a binding contract; and if he fails in such examination, and acknowledges by his acceptance the genuineness of the right to make the order upon him contained in the bill, it is his neglect, and must be his loss, rather than that of any one who has taken the bill in good faith and for value.[8]

These fundamental reasons, which we have given in the particular instance of forgery of the drawer's signature, have governed the courts in the other cases we have classified. Where there is no such person in fact as the drawer, then it has been decided [9] that the fair construction of the acceptor's undertaking is that he will pay to the order of the same person that signed for the drawer. He ought not to have accepted the bill without knowing whether or not there were such persons as the supposed drawers. If he chooses to accept without making the inquiry, then he must be considered as undertaking to pay to the signature of the person who actually drew the bill.

Closely connected with this is the kindred doctrine that the ac-

[8] Hoffman v. National City Bank of Milwaukee, 12 Wall. 193; Bank of U. S. v. Bank of Georgia, 10 Wheat. 333; Smith v. Chester, 1 Term R. 655; Bass v. Clive, 4 Maule & S. 15; Bank of Commerce v. Union Bank, 3 N. Y. (3 Comst.) 230; Goddard v. Merchants' Bank, 4 N. Y. (4 Comst.) 149; Canal Bank v. Bank of Albany, 1 Hill, 287.

[9] Cooper v. Meyer, 10 Barn. & C. 468. In this case, the defendants accepted bills drawn, apparently, by W., and some by U. & Co., and indorsed by the same, for the accommodation of D., for whom the bills were discounted by plaintiff. It was proved that the drawers and indorsers were fictitious, and that the names were written by D. It was held that defendants should not have accepted without knowing whether or not there were such persons as the supposed drawers. As they accepted without inquiry they were considered as undertaking to pay to the signature of the actual drawer. In Bass v. Clive it was held that the acceptor, before accepting a bill drawn upon him in the name of an aggregate firm, was bound to know whether the firm consisted of a plurality of persons, and when he accepted he was estopped from averring that it was not in fact drawn by an aggregate firm, since he has accredited the description by accepting the bill when so drawn. 4 Maule & S. 13.

ceptor may not set up as a defense that the drawer had no capacity to make the draft. He may not, for instance, say that the drawer is an infant [10] or a lunatic or a married woman [11] or a bankrupt,[12] or that, as a corporation, the act of drawing was ultra vires.[13] It is no defense that the acceptor can recover nothing over against the drawer because the drawer is incapacitated to make a contract, or because the acceptor has none of the drawer's funds in his hands. The acceptor of a bill in theory is presumed to accept upon the funds of the drawer in his hands. In ordinary business affairs, the very theory of a draft implies that the acceptor is entitled to a credit as between him and the drawer on their mutual current accounts if he pays the money called for in the bill or accepts it. And so, if he accepts without funds in his hands, and upon the credit of the drawer, he must look to the drawer for his indemnity.[14] If the acceptor were permitted to say, "The drawer is an infant or a lunatic, and I will not pay you upon this bill because the drawer will not pay me or credit me upon our mutual account," or if he were permitted to say, "I accepted the bill for the accommodation of the drawer, and the payee or holder took it knowing it to be an accommodation acceptance,[15] and I will not pay it," these would be very serious objections to the bill being negotiated. The reason which has influenced the courts is well stated by Judge Lawrence in Charles v. Marsden.[16] "It is to be supposed," he says, "that the drawer persuades a friend to accept a bill from him because he

[10] Taylor v. Croker, 4 Esp. 187.

[11] Smith v. Marsack, 6 C. B. 486.

[12] Braithwaite v. Gardiner, 8 Q. B. 473.

[13] Halifax v. Lyle, 3 Welsb., H. & G. 446. In this case a bill was drawn by a corporation on defendant, and was accepted by him. The corporation then indorsed the bill to plaintiff. To the action on this bill, the defendant pleaded that the corporation had no right to indorse. Held, that plea was bad; that the acceptor of a bill payable to drawer's order was estopped from denying that the drawer had authority to indorse it.

[14] Hortsman v. Henshaw, 11 How. 177; Jarvis v. Wilson, 46 Conn. 90; Heuertematte v. Morris, 101 N. Y. 63, 4 N. E. 1.

[15] Grant v. Ellicott, 7 Wend. 227; Harger v. Worrall, 69 N. Y. 370; Heuertematte v. Morris, supra; Canadian Bank of Commerce v. Coumbe, 47 Mich. 358, 11 N. W. 196.

[16] Charles v. Marsden, 1 Taunt. 224.

cannot lend him money. Now, would there be any objection if, with the knowledge of the circumstance that this is an accommodation bill, some person should advance money upon it before it was due." The indorsee has discounted the bill on the faith of the acceptor's promise, and it is no answer for the acceptor to say to him, "I have received nothing for this acceptance."

We cannot do better than follow Mr. Daniel in his succinct statement of reasons for the rule that the acceptor warrants, when the bill was indorsed before acceptance, that the payee was competent to indorse. To insure negotiable securities a ready circulation, a person may not dispute the power of another to indorse an instrument, when he asserts by the instrument which he issues to the world that the other has such power. The drawer of the bill, on his putting it into circulation, holds out to all the world that there is such a payee as is described in the instrument, and that, having made the instrument payable to such payee's order, the payee on his part may order the instrument paid to some one else in turn. When the drawee accepts the bill, he assents to these two propositions, and to the proposition, especially, that the payee is competent to indorse. Hence the acceptor may not say that the payee was an infant, or an insane person, or a bankrupt, or a corporation without legal existence. "Indeed," says Mr. Daniel, "there could be no reason why the acceptor should be interested to show that the payee was incompetent to make the order, for he has been guarantied in that regard by the drawer, and may charge the amount in account against him, whether the payee were competent or not." [17]

FACTS WHICH THE ACCEPTOR DOES NOT ADMIT.

71. An acceptance does not admit:

(a) That the payee's or subsequent indorsements are genuine.

(b) That all the terms contained in the bill at the time of acceptance are genuine. [18]

[17] Daniel, Neg. Inst. § 536.

[18] This rule probably applies to the acceptor supra protest.

The rules of the acceptor's estoppel, as we have seen, are based upon the supposed negligence of the drawee in failing, by an examination of the signature when the bill is presented, to detect the forgery of the drawer's name, and to refuse payment. The drawee should be supposed to know the handwriting of the drawer, who is usually his customer or correspondent, and, as between him and an innocent holder, the drawee from his imputed negligence should bear the loss. But here the courts stop. It is only the facts pertaining to the drawer, such as his existence, capacity, and authority, that the drawee can be reasonably presumed to be familiar with. But of the payee's indorsement, aside from his competency to indorse, he can know nothing.[19] Nor is there any reason why the acceptor should know that the body of the bill is in the drawer's handwriting, or in any handwriting known to the acceptor. If the alteration or forgery committed is that of the payee's name, or consists in altering the date or amount of the bill, there is no reason why the acceptor should be better able than the indorsers to detect an alteration or forgery. The forgery being in the body of the bill, or in the payee's signature, the greater negligence here is chargeable upon the party who received the bill from the perpetrator of the forgery.[20] The result of the foregoing rule is that, if the signature of the payee or of the indorser be forged, the acceptor will not be bound to pay the bill to any one who traces

[19] Holt v. Ross, 54 N. Y. 474. The general rule is that the acceptor admits the handwriting of the drawer, but not of the indorsers, and the holder is bound to know that the previous indorsements, including that of the payee, are in the handwriting of the parties whose names appear upon the bill. And, if it should appear that one of them is forged, he cannot recover against the acceptor, although the forged name was on the bill at the time of acceptance. Taney, C. J., in Hortsman v. Henshaw, 11 How. 177.

[20] Bank of Commerce v. Union Bank, 3 N. Y. 230; White v. Continental Nat. Bank, 64 N. Y. 620; Young v. Grote, 4 Bing. 253. In this case plaintiff left with his wife checks, signed in blank, on defendant's bank. One W., at the wife's request, filled out a check for a certain amount, but in such a way that the amount could be raised without possibility of detection. After showing check to the wife, W., without authority, raised the value of the check and secured the amount from defendant. It was held that due care was not taken in filling out the check, and, since the negligence was the plaintiff's, he alone must suffer.

title through such indorsements. And, if he has gone so far as to pay the bill to any one holding it under such forged indorsement, he may, as a general rule, recover back the amount. So, also, if the bill has been altered so as to purport to bind the drawer for a larger sum or in a different manner than in the original bill, he will not be bound to pay the bill. And, if the bill is paid, he may in the same way recover back the money paid upon it.[21]

ACCEPTOR SUPRA PROTEST.

72. The undertaking of the acceptor supra protest is analogous to that of the indorser.

73. To consummate the liability of the acceptor supra protest, it is necessary to take three steps:

(a) To present the bill at maturity to the original drawee.

(b) Upon refusal of the original drawee to pay, to protest for nonpayment.

(c) To present the bill for payment to the acceptor supra protest, and, on his refusal, protest it, stating the foregoing steps, notice of which must be sent to the drawer and indorsers.

The foregoing doctrines are common among the text writers, and are probably the positions which would be taken on the subject by the courts. The cases, however, involving questions of such acceptances, are not many, and the rules relating to them, therefore, not established. The meaning and process of an acceptance supra protest have already been explained.[22] As a contract, it is an undertaking to pay if the original drawee, upon a presentment to him, should persist in dishonoring the bill, and such dishonor by him be notified by protest to the person who has accepted for honor.[23] It is thus

[21] Holt v. Ross, 54 N. Y. 479; White v. Continental Nat. Bank, 64 N. Y. 316.

[22] See pages, supra.

[23] Hoare v. Cazenove, 16 East, 391. In this case it was held that the acceptors of a foreign bill of exchange, who, after presentment to drawees and refusal to accept, and protest for nonacceptance, accept the same for the

not like the contract of the acceptor,—an absolute engagement to pay at all events,—but only a collateral conditional engagement to pay if the drawee does not. Hence the reason of the giving of the acceptance requires a second resort to the drawee when the bill is in the hands of the holder under an acceptance supra protest, and a further protest for nonpayment by such drawee.[24] It might happen that in the meantime effects would reach the drawee, who had refused in the first instance, out of which the bill may and would be satisfied, if again presented to the drawee when the period of payment arrived. "This appears to me," said Chief Justice Tenterden,[25] "to be a very sensible interpretation of the nature of acceptances for honor where the parties say nothing on the subject. It is equivalent to saying to the holder of the bill: 'Keep the bill. Don't return it. And when the time arrives at which it ought to be paid, if it be not paid by the party on whom it was originally drawn, come to me, and you shall have the money.'" The courts thus clothe with language and interpret the intention of the acceptor supra protest in giving an acceptance and of the holder in receiving it.

Upon the refusal of the original drawee to pay the bill and its protest, it may or may not be paid by the acceptor for honor. If it is paid by him, such payment may be made for the honor of any or for the honor of all the parties,—for honor generally, as this last method of payment is termed. But unless some party or parties are specified in the acceptance supra protest, the courts construe the acceptance as made for the honor of the drawer.[26] Payments of this kind do not, like a single payment by the original drawee, operate as a satisfaction of the bill, but themselves transfer the holder's rights to the party paying.[27] For example, if the payment is made for the honor of a particular indorser, the party paying may sue such indorser and all parties prior to him to whom he could have resorted.[28]

honor of the first indorsers, are not liable on such acceptance unless there has been a presentment to the drawees for the payment and a protest for nonpayment.

[24] Schofield v. Bayard, 3 Wend. 488; Lenox v. Leverett, 10 Mass. 1.

[25] Williams v. Germaine, 7 Barn. & C. 468.

[26] Chit. Bills, 387.

[27] Smith v. Sawyer, 55 Me. 141; Vandewall v. Tyrrell, 1 Moody & M. 87.

[28] Mertens v. Winnington, 1 Esp. 112. In this case it was claimed by the defense that, where a bill is taken up for the honor of any of the parties

If he pays for the honor of the bill generally, it is the same as payment for honor of the last indorser, and he may recover against all parties to the bill.[29] But if the bill is not paid by the acceptor supra protest, then the rule for recovery against him laid down by Lord Tenterden [30] is generally applied, and the reasons for it accepted as the true ones. "Whatever is requisite to enable a person who has accepted a bill for honor of another, to call upon that person to repay him, and to enable him to recover over against such person, may also be reasonably held necessary to enable another party to recover against such an acceptor for honor. For, if you could recover against an acceptor for honor by proof of less than will enable him to recover against the party for whom he accepts, there would be an inconsistency. For it might be said with some reason that, if the acceptor for honor chose to pay without requiring all the proof from the holder which would be necessary for him to recover upon, the payment would be made in his own wrong, and he would not be entitled to recover over. It seems, therefore, that the same rule as to proof which prevails in the case of an acceptor for honor in suing the party for whose honor he accepts, must also be observed when the holder of a bill sues the person so accepting." This means, if we may be pardoned in amplifying the words of so great a judge, that, in prosecuting the acceptor supra protest, the steps are each to be demonstrated which fix the rights and liabilities of the parties. In the first place it is necessary to show the right of the acceptor supra protest to so accept. This is shown by pleading and proving if such be the case that the bill was first presented to the drawee for acceptance, but that its acceptance was refused and that thereupon,

whose names are on it, only such person is liable. It was held that, in such case, the party so taking up the bill may be considered as an indorsee paying full value, and consequently entitled to all remedies which an indorsee is entitled to, and to sue all parties to the bill.

[29] Fairley v. Roch, Lutw. 891. In Ex parte Lambert it was held that where a bill, accepted, being dishonored, is taken up for the honor of the drawer by the petitioner, the latter has a clear right as against the drawer. He has a right to stand in the place of the drawer; but he cannot make a title stronger than that of the drawer, thus ousting the assignees of the bankrupts of the defense which they would have against him. 13 Ves. 179; Ex parte Wyld, 30 Law J. Bank. 10.

[30] Williams v. Germaine, 7 Barn. & C. 468.

the bill being protested, the acceptance supra protest was made. The contract of the holder at this juncture is construed to be that he and subsequent parties have a right to collect the bill of the acceptor supra protest, provided the bill is not paid when due by the drawee,—the legal situation of the prior parties remaining unchanged until the liabilities and rights under the instrument are finally fixed at the time of the presentation of the instrument for payment. At this time the holder who has obtained the acceptance supra protest, or subsequent holders, for the reasons we have given, must present the instrument for payment to the drawee, and if payment is refused again protest it and then present it to the acceptor supra protest for payment. At this juncture the rights of the parties are that the holder who obtained the acceptance supra protest and all parties subsequent to him have the right to enforce payment against the acceptor supra protest upon pleading and proving the foregoing facts of the first and second presentment, protest and notice, and also the foregoing fact of notice to all parties for whose honor the acceptor supra protest has accepted.[21] It is probably the doctrine that they may also enforce the bill against parties prior to the time of the acceptance supra protest upon the foregoing fact of the protest for non-acceptance. The acceptor supra protest, if he pays the bill, whether by virtue of legal process or otherwise, is then not only subrogated to the rights of parties to the bill whom he pays, but also may recover both from the parties for whose honor he has accepted, and from all parties antecedent to them, all damages he may have incurred by reason of his acceptance. But to do so he must plead and prove all the facts upon which his liability rests.[22] There seems to be no reason from the equities of the case why the acceptor supra protest should not be subject to the estoppels which are implied in the acceptance of an ordinary acceptor. And although there is conflicting authority it has been held that they are the same.[23] He intends to assume by his act the liability of an acceptor, and his lia-

[21] Baring v. Clark, 19 Pick. (Mass.) 220; Gazzam v. Armstrong, 3 Dana, 554; Wood v. Pugh, 7 Ohio, pl. 2, p. 156.

[22] Schofield v. Bayard, 3 Wend. 491; Ex parte Wackerbarth, 5 Ves. 574; Hoare v. Cazenove, 16 East, 391; Byles, Bills, pp. 267, 271.

[23] Goddard v. Merchants' Bank, 4 N. Y. 147; Salt Springs Bank v. Syracuse Savings Inst., 62 Barb. 101. See, contra, Wilkinson v. Johnson, 3 Barn.

bility would probably be held by the courts to be the same were questions of this character often coming before them for decision. But the rule thus laid down has been but little discussed and this enunciation of them therefore is rather speculative than positive.

DRAWER AND INDORSER.

74. Every drawer promises the payee and subsequent holders, and every indorser promises his indorsee and subsequent holders, that if the bill or note is presented for payment to the drawee, acceptor, or maker, and payment demanded and refused, and the bill or note is protested, and due notice of these facts is sent to him, he will indemnify the holder for loss.

75. The drawer of a bill of exchange promises the payee and subsequent holders, and the indorsers before acceptance promise subsequent holders, that if on due presentment the bill be not accepted, and due notice of that fact be given, he will indemnify them for loss.[34]

76. The liability of the drawer and of each indorser is several from that of all the other parties to the instrument.

In the chapter relating to "Indorsement" the student was introduced to two of the ideas embodied in the principal text. The first was that an indorsement was a contract separate and apart from that evidenced by the terms set forth on the face of the paper. The second was that in addition to these terms so set forth it was a contract in which the law itself implied others equally important.[35] The terms last spoken of consist of certain conditions precedent to the right of its enforcement as a contract of indemnity, which were presentment for acceptance to the drawee or for payment either to the acceptor of the bill or the maker of the note, and in case of its dishonor then that due notice of that fact should be given

& C. 428. But see Phillips v. —— Thurn, L. R. 1 C. P. 463, holding that it admits the drawer's signature alone. 18 C. B. 694.

[34] These propositions are adopted from Ames, Bills & N. p. 817.

[35] See, also, Castrique v. Buttigieg, 10 Moore, P. C. Cas. 94.

the indorser. In the chapter relating to "Acceptance," and in a foregoing section of this chapter, the student was further introduced to the idea that the liability of the drawer is a shifting one. Before acceptance he is the party primarily liable; after acceptance he is the party secondarily liable, his position being that substantially of an indorser, and subject to the rules we have just stated. In a later section of this work we shall show that presentment for acceptance by a holder is not vital to the life of his various contracts with the other parties to the bill. It is only for his better security. And although the holder of a bill, by its nonacceptance, may acquire a right of action against the drawer and indorsers prior to himself, it is not absolutely necessary for him to do so.[86] These facts being explained, it leaves little to be said about the principal text. In fact, the principal text is set out mainly that the student may fix its statements in mind by way of contrast to the contract of the maker and acceptor.

There are, however, two points to be noticed. They are that the liability of the drawer and indorser are in most respects identical, and that their liability is several. "There is no distinguishing the case of an indorser from that of the drawer," said Lord Ellenborough,[87] "it having been long ago decided that every indorser is in the nature of a new drawer, every indorsement as a new bill, and that the indorser stands to his indorsee in the law merchant the same as the drawer." With both drawer and indorser a distinct bill is drawn. With the drawer, the contract is between himself and the payee; with the indorser, between himself and his indorsee, the indorser standing in the place of the drawer, the remedy of the indorsee being first against his immediate indorser and then against the original drawer as the assignee and standing in the place of the indorser. In this respect the case of the promissory note when once indorsed and the bill of exchange are parallel. In the case of the promissory note before indorsement the contract is only a promise to pay, but after indorsement it becomes an order by the indorser upon the maker of the note to pay the debt of the maker transferred

[86] Walker v. Stetson, 19 Ohio St. 400, Johns. Cas. Bills & N. 89; Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283; Id., Johns. Cas. Bills & N. 104.

[87] Ballingalls v. Gloster, 3 East, 481.

to indorser, and again by him as indorser transferred to his indorsee.

The difference between the bill and the note is therefore one but of words, the indorser of a promissory note being almost the same as the drawer of the bill of exchange.[88] It is partly this reason and partly the business one that the drawer and indorser may protect themselves, the drawer by withdrawing his effects from the hands of the acceptor, the indorser by taking steps against parties prior to him, that are the foundations of the rule that both drawer and indorser are entitled to the prior presentment and protest and notice.[89] It is also the reason of the estoppels discussed in the next succeeding sections applying to drawer and indorser alike. And it may be stated generally, and the student must fix it in his mind, that the doctrines of the contract of the drawer are the doctrines of the contract of the indorser, because they are, in their legal effect, one.

The second point to be fixed in the mind is the character of the contract of the drawer and of each indorser as several from that of

[88] Heylyn v. Adamson, 2 Burrows, 669. In this case it was held "that in actions upon inland bills of exchange, by an indorsee against an indorser, the plaintiff must prove a demand of, or due diligence to get the money from, the drawee (or acceptor), but need not prove any demand of the drawer; and that, in actions upon promissory notes by an indorsee against the indorser, the plaintiff must prove a demand of, or due diligence to get the money from, the maker of the note."

[89] Blesard v. Hirst, 5 Burrows, 2670. This was a case where an inland bill made payable to one, and by him indorsed to a third party who tenders it for acceptance and is refused, and who then kept it for some time without giving notice of the refusal. It was held that the third party should have given notice, and that by failing to do so, he took the risk upon himself as the indorser of the bill was imposed upon. The one guilty of the negligence should suffer for it. In the case of Collott v. Haigh, a bill drawn by defendant upon J. D. and accepted by him for defendants' accommodation, was indorsed to plaintiffs. Upon maturity, time was given to J. D. in consideration of his giving security to plaintiffs, which security proved not to be available. It was held that such granting of time to the acceptor did not discharge the defendant, and he cannot defend himself on that ground, or for want of notice, as the bill was for his accommodation. 3 Camp. 281. Gale v. Walsh, 5 Term R. 239; Aniba v. Yeomans, 39 Mich. 171; Newberry v. Trowbridge, 13 Mich. 263.

every other party to the contract. It naturally follows that, so long as the promise of the drawer and indorser is a separate and independent one, it must always be separate in the liability incurred under it. The indorsee enters into a contract with his immediate party from whom he got the bill and who indorsed it to him. Every prior indorser on the bill, by virtue of his indorsement, makes a promise to each new indorsee. If A, B, C, and D are indorsers on a negotiable instrument, A makes separate promises to do certain things with B, C, and D; B with C and D; and so on. Each makes a separate promise with every individual who comes after him on the instrument. The liability of each indorser is in legal phrase several from that of all other parties to the instrument. Under the old common-law rule this meant that the holder might sue the parties to the instrument one at a time, or he might sue separate indorsers in separate actions at the same time. But if any one of these indorsers thus sued should pay the instrument the claim of the holder against each upon it was satisfied.[40] It may have meant that the holder might enforce his claim against all parties at once, though he could not sue some of them, omitting to sue others. But this last proposition, strictly speaking, is the enforcement of a joint and several liability, and for it there seems to be but little authority except its practicability. But, whatever the former rule may have been, it is now generally settled by statute throughout the Union that one or any or all the parties to the instrument may be sued upon their several liability at one time or at separate times.

WARRANTIES OR FACTS WHICH THE DRAWER IS ESTOPPED TO DENY.

77. The drawer of a bill before acceptance undertakes with the payee and subsequent holders:

(a) That there is a drawee, and that he is capable of accepting.

(b) That he will accept.

When the drawer issues a bill to the world, he undertakes two things. One is that the situation, nature, or character of the

[40] Chit. Bills, 538, 539; Daniel, Neg. Inst. § 1203.

drawee is such that the bill can be accepted; and the other is that the drawee, upon presentment, will accept the bill. The legal interpretation of the words on the face of the bill indicating the place of presentment to the drawee, as, "To John Smith, at Baring Bros.," is that the drawer contracts that the drawee may be found at that place, and the bill presented to him there.[41] Thus, in case of a bill[42] drawn on Paris, where the French directory, for public reasons, forbade its acceptance, the court so applied the rule that ultimately the loss should not fall upon the payee or indorser, but upon the drawer who issued the bill, who, it is to be inferred, was deemed to warrant that the situation of affairs would be such that the bill could be presented for acceptance. If this turned out not to be the case, then the drawer must bear the loss. This loss to be borne by him consists of all loss incurred, such as re-exchange, notarial expenses, and other damage[43] necessarily incidental to the failure to obtain the acceptance, because the party taking the bill was obliged to make these expenditures to collect the bill, and if the drawer's contract was broken, and such collection failed, the drawer must reimburse such party.[44] The holder of a bill, whom it reaches, in the course of its circulation, may present the

[41] Edw. Neg. Inst. § 530; Wing v. Terry, 5 Hill (N. Y.) 160.

[42] Mellish v. Simeon, 2 H. Bl. 378.

[43] Auriol v. Thomas, 2 Term R. 52. In this case a bill of exchange, 2,800 star pagodas, payable to defendant or order, and directed to G. M. Madras, was indorsed to plaintiffs, who discounted it at the rate of exchange, 6s. 6d. per pagoda. On sending the bill to Madras it was returned protested for nonacceptance and nonpayment. The plaintiffs recovered 10s. per pagoda and £5 per cent. after end of 30 days' notice to defendant. Such recovery was held not usurious, as it was proved to be the usual custom in case of such bills, as such recovery included charges of remission and other incidental expenses as well as legal interest. In Gantt v. Mackenzie, a bill of exchange was presented for acceptance and refused, April 17, 1809, and was presented for payment on the 19th of June of the same year. It was decided that the holder was entitled to £10 per cent. as damages, and interest was to be allowed from the time of presentation for payment. 3 Camp. 51. In Mellish v. Simeon, it was held that where the holder has been guilty of no default, the drawer is answerable for the amount of the bill, and also for the re-exchange which is a consequence of the bill not being paid. 2 H. Bl. 378.

[44] Byles, Bills, 402; Daniel, Neg. Inst. § 4445; and Weldon v. Buck, 1 Johns. 444.

bill to the drawee; and, if he refuses to accept, although the bill is not due, the holder may at once turn and hold the drawer, indorsers, and all parties upon the bill prior to himself. The reason of this is to guaranty the circulation of bills, by preventing the drawer from withdrawing funds from the hands of the drawee before the bill is presented, and also to assure the holder that, if anything is wrong between the drawer and drawee, and the drawee refuses to accept, he may at once turn for reimbursement to the parties through whom the bill has been circulated, and who treated it as the equivalent of cash, and were paid money, each in turn, for it.[45] The further effect of this rule will be considered in the chapter on "Presentment."

The courts speak of this legal relation of the drawer as a stipulation or part of the contract rather than as an estoppel. This is because the reason of the rule is somewhat different from that which is the basis of the estoppels of the acceptor. It is argued that the main purpose of the contract between the drawer, on the one hand, and the payee and person to whom he transfers his rights, on the other, is to remit money. For this purpose the payee and subsequent holders pay valuable consideration. To effect this purpose, the drawer, on his part, agrees that the money shall be paid at the time, place, and by the person nominated in the bill. Of the very essence of this agreement, therefore, is the fact that the drawee, who may be a stranger to the payee or subsequent holder, should be found in the place where he is described to be.[46] Otherwise, it would be the duty of the holder to search the world over for the person to pay him in turn the money he had paid the drawer. It is also of its essential nature that the drawee shall have funds in his hand to warrant his accepting, or that he accepts from some other consideration, immaterial to the payee, perhaps, but good as

[45] Ballingalls v. Gloster, 3 East, 481; Mason v. Franklin, 3 Johns. 202; Weldon v. Buck, 4 Johns. 144; Miller v. Hackley, 5 Johns. 375; Bank of Rochester v. Gray, 2 Hill, 227.

[46] De Wolf v. Murray, 2 Sandf. 166; Hine v. Allely, 4 Barn. & Adol. 624. In this case an accepted bill was presented at the place of payment specified in the instrument, but the house was closed. It was objected that for this reason there had been no presentment, but it was held that the presentment as described was good. Buxton v. Jones, 1 Man. & G. 83; Pierce v. Struthers, 27 Pa. St. 249.

between the drawer and drawee. In other words, as between the drawer and payee, the drawee, though he is designated as the person to make the payment, is a mere agent of the drawer; and the latter, therefore, since he undertakes for his agent's acts, "undertakes that the acceptance be made at all events." [47]

WARRANTIES OR FACTS WHICH THE INDORSER IS ESTOPPED TO DENY.

78. The indorser of a bill or note is estopped from denying, and warrants to his indorsee and to all subsequent holders:

(a) That the bill or note will be accepted and paid.

(b) That the bill or note is, in every respect and as to all prior parties, genuine, and neither forged, fictitious, nor altered.

(c) That the bill or note is a valid and subsisting obligation, and that the contract obligations of all prior parties are valid.

(d) That the prior parties were competent to bind themselves, whether as drawer, acceptor, maker, or indorser.

(e) That he, as indorser, has a lawful title to the bill or note, and also a right to transfer it.

It is interesting to notice that the double relation of the indorser, as a transferror of title and the maker of a distinct contract embodying certain warranties as a part of its stipulations, is found in the earliest development of the theories of commercial paper.[48] As early as the year 1700 Lord Holt admitted without question the idea that an indorser was a transferror of title. And, further, in answer to the argument that if the payee and indorser of a bill were one and the same person the indorser was merely a transferror, his lordship replied that the law at that day was that an indorsement was a

[47] Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367.

[48] Bank of England v. Newman, Ld. Raym. 442.

conditional warranty and made a new contract.[49] And 150 years later an English judge equally distinguished, speaking of this doctrine of warranty thus promulgated by Lord Holt, said "it was established by a long string of authorities." [50] Its reason is that, if the contract of indemnity of the indorser is to the effect that if the party promising or requested to pay the amount specified in the instrument does not pay he (the indorser) will, it from its very nature presupposes that he also promises that he will not raise as a defense any of the facts we are about to mention. Business faith would not allow him to have in mind the intention to raise these defenses and yet promise indemnity at the same time. And therefore the first reason of the estoppels or warranties of the indorser is that he is excluded from setting up certain facts of defense because these facts are wholly inconsistent with his promise of indemnity.

A clear idea of this doctrine, treated as one of warranty, can be obtained by comparing it to other classes of property. Just as the vendor of chattels or of real estate warrants certain things to be true of the property that he sells, so the indorser of a bill or note, by discounting it at a bank, or offering it in payment for goods sold, or circulating it in any way, guaranties or warrants that certain facts are true of the instrument.[51] And when the maker of a note or acceptor of a bill refuses to pay it, on the ground that it is forged or altered or usurious, or that the parties were infants, or that the bill had been stolen, the bank who has taken it, or the party who has accepted it in payment for goods, turns upon the indorser who trans-

[49] Lambert v. Oakes, 1 Ld. Raym. 443. This case also held that if the indorsee does not demand the money payable by the bill of the person upon whom it is drawn in convenient time and he afterwards fails, the indorser is not liable.

[50] Campbell, C. J., in MacGregor v. Rhodes, 6 El. & Bl. 266.

[51] The indorser of a bill of exchange undertakes that the drawee will pay it, if the holder present it to him at maturity and demand payment; and if he refuse to pay it, and the holder cause it to be protested, and due notice to be given to the indorser, then he promises to pay it. All these conditions enter into and make part of the contract between the parties to a foreign bill of exchange; and the law imposes the performance of them upon the holder, as conditions precedent to the liability of the indorser of the bill. McKinley, J., in Musson v. Lake, 4 How. (U. S.) 262.

ferred it to him, and sues him upon his indorsement. And, when the indorser sets up any of these facts by way of defense, the holder answers, "I am suing you upon a separate contract in which you warranted these things to me," and the courts conclude the indorser from such a defense.

The warranty is thus implied in an indorsement partly because of the nature of the promise of an indorser and partly because the transfer of the paper by indorsement is something in the nature of a sale. And thus we find that some of the warranties extend not only to paper actually indorsed by one person to another but also to paper transferred by delivery by one person to another without indorsement. And at the risk of some confusion in the student's mind we desire to classify the warranties against defenses as those which apply to a sale by mere delivery and those which apply to a sale accompanied by indorsement. A transferror by delivery warrants the genuineness of the signatures;[52] that the title is what it purports to be,[53] that the paper is of the kind and description that it purports to be,[54] that he has no knowledge of any facts that prove the paper to be worthless;[55] and that the transferror has done nothing to prevent the transferee from collecting the paper.[56] The reason given in case of forged paper is that it is nothing; that the transferror has given nothing for the original consideration; and that, therefore, the bill or note may be rejected, and he may be sued upon the original consideration. But the reason, as given by the courts of New York, in all cases other than those where the warranty is of title, and that the instrument is genuine, and not forged, is that the implied warranty is based upon a scienter. By this is meant that the implied warranty, when the bill or note is transferred by delivery, is upheld by the general principle of sales,—that whenever an article sold has some latent defect, which is known to the seller and not to the purchaser, the former is liable for this defect, if

[52] Frank v. Lanier, 91 N. Y. 112; Bell v. Dagg, 60 N. Y. 528.

[53] Murray v. Judah, 6 Cow. 483; Herrick v. Whitney, 15 Johns. 240; Shaver v. Ehle, 16 Johns. 201.

[54] Whitney v. National Bank of Potsdam, 45 N. Y. 303; Fenn v. Harrison, 3 Term R. 757; Gurney v. Womersley, 4 El. & Bl. 133.

[55] Brown v. Montgomery, 20 N. Y. 287.

[56] Edw. Neg. Inst. § 355.

he fails to discover his knowledge on the subject at the time of the sale. The courts, rather vaguely, it seems, say that, where knowledge is proved by direct evidence, the responsibility rests on the ground of fraud. Where the probability of knowledge is so strong that courts will presume the existence without proofs, the vendor is held responsible upon an implied warranty. The difference between the cases is that in the one the scienter is actually proved, in the other, presumed. Without knowledge of some sort in cases of instruments transferred by delivery, there is no warranty.[57] The language of the decisions summarized is that, where the maker or acceptor will not pay the note or bill for any other reason than forgery, then the transferror by delivery without indorsement is not liable for the defect in the instrument which prevents recovery upon it, unless he knew of, or can be presumed to have known of, that defect. If he knew of it, then the transfer was a fraud, and the transferror is liable in an action for deceit. If he can be presumed to have known it, then a warranty is implied upon which the transferror is liable. The student must keep in mind that this rule and these reasons have been explicitly enunciated only in New York.[58] And all that can be said of it as a rule of general application is that the reasons for its being may possibly lead to its adoption in other jurisdictions. It seems to be the doctrine of the federal courts,[59] and it is likely that it prevails in England.[60] But it is controverted by text writers of great authority,[61] but not, as it would seem, upon grounds entirely consistent with the theory of contract. For, while they admit as unquestioned law that any ordinary warranty of a bill or note may be excluded by express agreement of the transferror and transferee,[62] it is submitted they do not give to the

[57] Littauer v. Goldman, 72 N. Y. 506.

[58] Littauer v. Goldman, 72 N. Y. 506; Edw. Bills & N. § 355; Mandeville v. Newton, 119 N. Y. 13, 23 N. E. 920; Meridian Nat. Bank v. Gallaudet, 13 N. Y. St. Rep. 269.

[59] Otis v. Cullum, 92 U. S. 448.

[60] Chit. Bills, p. 247; Fenn v. Harrison, 3 Durn. & E. (3 Term R.) 757; Lambert v. Heath, 15 Mees. & W. 485; Hall v. Conder, 26 Law J. C. P. 138; Camidge v. Allenby, 6 Barn. & C. 373.

[61] Tied. Com. Paper, § 244; Rand. Com. Paper, § 757; Daniel, Neg. Inst. § 733.

[62] Bell v. Dagg, 60 N. Y. 528.

fact of failing to indorse at all its reasonable intendment. It would seem to mean, if it meant anything, an intention to sell the paper as it stood, good, bad, or indifferent. If the seller did not indorse, he evidently did not intend to make the contract usually construed from an indorsement. If the purchaser did not ask the seller either to indorse, or any questions concerning the character of the paper, or the seller did not make to the purchaser any representations which would be valid as an express warranty on the seller's part,[62] then the reasonable construction of this silence would be that there was no intention to hold the seller to the warranties we have mentioned. A contract between them could rest upon no outward evidence of intention. It could only be based upon the fairness of the case. And this, it would seem, would depend upon the knowledge in the transferror.

Where there is an indorsement, these reasons obviously do not prevail. The transfer of an unindorsed instrument payable to bearer is akin in principle to the transfer of an ordinary chattel, or, more correctly speaking, an ordinary chose in action. The transfer upon an indorsement has not only all the elements of the transfer without indorsement but also those arising from the contract which the indorser makes. These are the ones specified in the principal text. For reasons we have already given he is held bound to warrant that a bill will be accepted. Because he contracts to in-

[62] Milks v. Rich, 80 N. Y. 269; Bruce v. Burr, 67 N. Y. 237; Cardell v. McNiel, 21 N. Y. 336. In this case, notes of a certain bank in another city were given to plaintiff by defendant for goods bought from the former. On the same day the bank stopped payment. Seven days afterwards the notes were offered to defendant and payment asked, which he refused. It was held that plaintiff could not recover. It was his duty to notify the defendant in a reasonable time of the insolvency of the bank, and neglect to do so may have been prejudicial to the defendant. In Henderson v. Appleton, notes of a certain bank were given on the 19th, which could not have been presented by post until the 21st. It appeared that the bank had stopped payment from the 17th. On the 21st plaintiff met defendant in the city where the bank was located, and offered to return the notes, but was refused. In an action of assumpsit, the verdict was for the plaintiff. Chit. Bills (10th Ed.) 246, note 4. See, also, the case of Swinyard v. Bowes, in which it was held that the defendant, not being a party to a bill, was not entitled to notice. 5 Maule & S. 62.

demnify the holder of a bill or note he is held to warrant against its nonpayment for any cause. Thus, in warranting its genuineness, he agrees that if the instrument cannot be enforced against the drawer, acceptor, or maker, whose names appear upon it, because these names are forged, these defenses will not avail him;[64] and this rule also applies in case of prior indorsements.[65] In warranting its validity he agrees that if the paper cannot be enforced against the acceptor or maker because of some illegality in its inception, such as paper given for a gaming debt,[66] or tainted with usury,[67] or given for other illegal considerations,[68] these defenses will not avail him. In warranting the competency of the parties he agrees if the paper cannot be enforced against the original parties because they were incapable of contracting, because they were married women,[69] or because they were a copartnership,[70] or as an agent,[71] or as a corporation,[72] that these defenses will not avail him. And, the reason being the same in case of genuineness and competency,

[64] Coggill v. American Exch. Bank, 1 Comst. (1 N. Y.) 113; Mosher v. Carpenter, 13 Hun, 604; Turnbull v. Bowyer, 40 N. Y. 456; Meacher v. Fort, 3 Hill (S. C.) 227, and Riley, 248; Hannum v. Richardson, 48 Vt. 508; Condon v. Pearce, 43 Md. 83; York Co. M. F. Ins. Co. v. Brooks, 51 Me. 506; Chase v. Hathorn, 61 Me. 505; Selser v. Brock, 3 Ohio St. 302.

[65] Turner v. Keller, 66 N. Y. 66; Ogden v. Saunders, 12 Wheat. 313; Fish v. First Nat. Bank of Detroit, 42 Mich. 204, 3 N. W. 849; Williams v. Teshomingo Sav. Inst., 57 Miss. 633.

[66] Bowyer v. Bampton, 2 Strange, 1155, 7 Mod. 334; Edwards v. Dick, 4 Barn. & Ald. 212.

[67] Morford v. Davis, 28 N. Y. 481; Ingalls v. Lee, 9 Barb. 647; McKnight v. Wheeler, 6 Hill, 492; Ord, Usury, 109.

[68] Graham v. Maguire, 39 Ga. 531; Succession of Weil, 24 La. Ann. 139.

[69] In the case of Erwin v. Downs, it was held that the indorsement of a promissory note imports a guaranty that the makers were competent to contract, and that one who became the holder of such a note for a valuable consideration, before maturity, is not deprived of the right to rely upon the guaranty of the indorser, even though such holder have knowledge that the makers were incompetent, as being married women. Erwin v. Downs, 15 N. Y. 575; Haly v. Lane, 2 Atk. 181; Kenworthy v. Sawyer, 125 Mass. 28; Robertson v. Allen, 3 Baxt. 233.

[70] Dalrymple v. Hillenbrand, 62 N. Y. 5.

[71] Burrill v. Smith, 7 Pick. 291.

[72] Remsen v. Graves, 41 N. Y. 471; Zalbriskie v. Cleveland, C. & C. R. Co. 23 How. (U. S.) 399.

it is probable that this rule applies also to prior indorsers.[73] In warranting title and right to transfer he agrees that, if the instrument cannot be enforced against the original parties because it was lost by them or stolen from them, these defenses will not avail him, because he held himself out as having a good title, and therefore a right to transfer.[74] And all the warranties are binding principally because the indorsement is a distinct contract.

A thoroughly consistent theory, it might be urged, would require that if the principal contract, set forth on the face of the instrument, is void ab initio, all the subsidiary contracts of indorsement depending upon it would also be of no legal effect, because they could never give life to a contract which had no existence. But even granting this to be so, yet legal theory is overruled by common sense. Besides, it is not always necessary that the principal contract to which a collateral contract of guaranty is added should be enforced in order that the contract of guaranty may avail.[75] A guarantor can sometimes be held, although no suit whatever can be maintained on the original debt. For it is sometimes the very essence of a guaranty that it is given because the principal debt cannot be enforced, as in cases where the guarantor undertakes to be responsible for the goods to be supplied to a married woman or an infant. Neither does the fact that the guarantor cannot call upon the person for whom he has given his guaranty constitute any defense. The party to whom the guaranty is given has nothing to do with their mutual relations. The indorser guaranties to such party the payment of the instrument, and, if it is not paid, he immediately becomes liable upon this guaranty.[76] Whether also he knew of any defects in the instrument is immaterial. If the indorser knew of defects, he is undoubt-

[73] Daniel, Neg. Inst. § 676.

[74] Edw. Neg. Inst. § 407; Daniel, Neg. Inst. § 677; Rand. Com. Paper, § 755.

[75] McLaughlin v. McGovern, 34 Barb. 208.

[76] Remsen v. Graves, 41 N. Y. 471. In the case of Lawson v. Farmers' Bank it was held by the court that the liability of the indorser was strictly conditional and dependent upon due demand upon the maker or acceptor and also due and legal notice of nonpayment. The purpose of such demand is to enable the indorser to look to his own interests and to secure his own indemnity. Demand and notice being conditions precedent to the indorser's liability, the holder must make proof of them before he can recover. Lawson v. Farmers' Bank of Salem, 1 Ohio St. 206.

edly liable under the general principles of warranty already given. If the indorser did not know of defects, he is none the less liable in damages upon the construction of the general contract of indemnity he made when he indorsed the instrument.

The identity of this contract as a distinct stipulation becomes more apparent when we consider the practical application of these rules by the courts. Where the bill or note is forged or altered, for example, it is void, as we have said, because in fact no such legal obligation was ever created. Money, therefore, paid upon the indorsement of such a bill or note, is governed by the same principle that governs other money paid under a mistake of fact. In other cases the equitable action for money had and received will lie against one who has received money which in conscience does not belong to him.[77] And so, when the maker or acceptor or a prior indorser has refused to pay a note or bill upon the ground that it is void because of forgery, or alteration, or on the ground of usury, gaming consideration, or the like, the holder, relying upon the so-called "warranty" of the indorser, may hold him upon his indorsement for the money paid to him for the instrument.

INDORSER WITHOUT RECOURSE.

79. The warranties specified in the foregoing section, except that of payment, apply to the indorser without recourse.

The indorser without recourse and the transferror of a bill or note by delivery stand upon much the same footing. So far as an indorsement and transfer is a promise of indemnity, neither the transferror without indorsement nor the indorser without recourse promise to pay the instrument. In fact, the object of an indorsement without recourse is to relieve such an indorser from his obligation as a promisor of indemnity. He exempts himself by these words from his promise to pay if the parties antecedent to him do not. But because it is, in effect, a sale where the indorser, like the vendor of any chattel, warrants the title and genuineness of the thing to be what it purports, or if he was without title,[78] so it does not relieve him

[77] Kelly v. Solari, 9 Mees. & W. 54. [78] Challiss v. McCrum, 22 Kan. 157.

from liability if the instrument he transfers was forged [79] or illegal,[80] or not what it purports.[81] This is for the same reason, and is governed by the same principles, already stated at length, which govern transfer by delivery.

DAMAGES AGAINST THE ACCEPTOR, MAKER, DRAWER, AND INDORSERS UPON THE BILL OR NOTE AND UPON THE WARRANTIES.

80. The acceptor of a bill of exchange and the maker of a promissory note is liable, upon its dishonor, for the amount of the bill or note and legal interest, and also notarial expenses where they are allowed by law.

Where the drawee of a bill of exchange has agreed for a valuable consideration to accept it, he is liable, upon its dishonor, for his breach of promise to accept in all damages which are the immediate consequences of such breach.

The measure of damages to be recovered against a drawer or indorser upon his indorsement is—

(a) On an inland bill: the amount of the bill and interest, and also protest fees where they are allowed.

(b) On a foreign bill: the amount of the bill, interest, protest fees, re-exchange, or damages in lieu thereof.

The measure of damages to be recovered against the drawer or indorsers in case of a breach of warranty is the original consideration.

[79] Dumont v. Williamson, 18 Ohio St. 515.

[80] Blethen v. Lovering, 58 Me. 437. In this case, the defendant indorsed to the plaintiff, "without recourse," for valuable consideration, a note, a short while before its maturity. It was shown that there was no consideration for the note when made, and it was held that in such case the defendant's liability accrued at the time of indorsement, and here the statute of limitation barred the action. Hannum v. Richardson, 48 Vt. 508.

[81] Ticonic Bank v. Smiley, 27 Me. 225.

It is our purpose to point out in this section the practical application of the rules we have laid down, by showing what damages the courts administer against the parties upon the breach of their contracts. For the present we shall leave the matter of consideration as a basis for damage, both as between parties immediate and not immediate, out of the question. The rules pertaining to this point will be discussed further on. The only point to be considered is the damages which, assuming the contract between the parties to be for value, and enforceable, the courts find were in contemplation of the parties when it was made.

In some of these contracts, important items are exchange and re-exchange. Exchange, as we have seen, is the market value in one country of money to be delivered in another. The drawer of a foreign bill contracts for its payment at the place where it is drawn payable. When the bill is dishonored, the doctrine of re-exchange applies. Re-exchange is a doctrine founded upon equitable principles. It means, for instance, when the payee, for example, gives premium for a bill drawn in this country payable in Paris, France, which is dishonored in Paris, the amount which would restore the payee to the situation he was in when he bought the bill. This is either the payment of the money in Paris that the payee expected to and would get there, or the payment in this country of those sums, together with the difference in value between the whole sum at Paris and the same amount in this country. This difference in value is ascertained by the premium on a bill drawn in Paris and payable in this country which should sell at Paris for the sum claimed.[82] The amount and nature of exchange and re-exchange is generally regulated by statute throughout the various states. Interest is too well understood to need definition. Notarial fees are those incurred for a notary where protest is required or permitted by law.

The other principal item of damage is the amount nominated in the principal terms of the paper, and this discussion principally pertains to this, and how far the warranties relate to it. The general rule is that the acceptor and drawer of a bill, the maker of a note, and all indorsers are liable for the amount nominated in the bill,

[82] Bank of U. S. v. U. S., 2 How. 737.

and interest.[83] In addition to this, the rules governing these parties as to re-exchange and fees are as follows: The acceptor at common law is probably not primarily liable for re-exchange, because his contract is to pay the money named in the bill at the place of payment and not at the place of drawing;[84] nor is he liable for damages,[85] though the better reason seems against this rule, where the acceptor has dishonored the bill which he had promised to pay and the drawer has been obliged to pay re-exchange.[86] It is probably the common-law rule, also, that the maker of a note is liable neither for re-exchange nor damages because of the supposed rule that notes are subject to the rules of the law merchant only in those respects covered by the enactment of the statute of Anne;[87] though it must be added that this point is by no means settled.[88] Protest fees are chargeable against the acceptor and maker only when a protest is required or permitted by law. But when it is required, or permitted but not required, they are allowed as an item of damage.[89] The drawer and the indorsers, in their succession, are liable for protest fees, and, in case of foreign bills, for all re-exchanges, or else damages in lieu thereof.[90]

These rules being understood, it only remains to consider the damages administered by the courts with reference to the drawee, when he refuses to accept, and upon the warranties which have been the subject of discussion in this chapter. Of these latter, the students

[83] Daniel, Neg. Inst. § 749; Rand. Com. Paper, § 1726.

[84] Newman v. Goza, 2 La. Ann. 642; Trammell v. Hudmon, 56 Ala. 237; Watt v. Riddle, 8 Watts, 545.

[85] Bowen v. Stoddard, 10 Metc. (Mass.) 375; Manning v. Kohn, 44 Ala. 343.

[86] Daniel, Neg. Inst. § 4450; Rand. Com. Paper, § 1714; Tied. Com. Paper, § 406.

[87] Martin v. Franklin, 4 Johns. 124; Scofield v. Day, 20 Johns. 102; Adams v. Cordis, 8 Pick. 260; Lodge v. Spooner, 8 Gray, 166.

[88] Lee v. Wilcocks, 5 Serg. & R. 48; Grant v. Healey, 3 Sumn. 523, Fed. Cas. No. 5,696.

[89] Johnson v. Bank of Fulton, 29 Ga. 260; German v. Ritchie, 9 Kan. 110; Merritt v. Benton, 10 Wend. 117 (where it was held that the protest fee is an expense to which the holder of a note is subjected by the default of an indorser, whose duty it is to pay at maturity, and that the holder should therefore recover it. "It may fairly be considered as a charge incident upon the indorser's failure to perform his contract").

[90] Tied. Com. Paper, § 407.

will have noticed that we have pointed out a distinction between the acceptor, on the one hand, and the drawer and indorser, on the other. In the case of the acceptor, the rules of law were merely to the effect that the acceptor was estopped from denying certain items. There was nothing of a promise which might be the basis of an affirmative right contained in them. The acceptor's liability, therefore, is limited to the contract contained in words of the bill. But the liability of the drawer and indorser is a so-called warranty, and the basis of an affirmative right of action. It is different in its nature from the estoppel of the acceptor, because the acceptor is not affirmatively liable as acceptor upon them. He is, however, liable as drawee before acceptance to the drawer, if, under certain circumstances, he does not accept the bill. The drawer, as we have seen, may then have one of two remedies. He may either sue the drawee upon the original consideration or for damages.[91] What the original consideration is will be different according to the circumstances of each case. Where the drawer chooses the alternative of damages, he sues upon the promise to accept, and the damages are then measured by his loss and inconvenience, and not by the amount of the draft.[92] The promise to accept is then the foundation of the right of action, and not the bill itself.

The general rule that the warrantor shall pay so much as the actual value of property falls short of what it would be worth if the warranty had been kept, applicable to warranties of quality or title of personal property, does not apply to bills and notes.[93] With negotiable instruments between immediate parties the recovery of damages is limited to the amount paid out by reason of the breach of warranty, or, in other words, to refunding the consideration.[94]

[91] See supra, p. 80.

[92] 2 Suth. Dam. p. 104; Ilsley v. Jones, 12 Gray (Mass.) 260; Sedg. Dam. (6th Ed.) p. 296.

[93] Freeman v. Clute, 3 Barb. 424; Pritchard v. Fox, 4 Jones (N. C.) 140; Sedg. Dam. (6th Ed.) p. 340.

[94] Munn v. Commission Co., 15 Johns. 43. In this case it was decided that, where a payee parts, for a discount greater than the legal rate of interest, with a valid note upon which he might maintain an action when mature, such transfer is not usurious, even where the payee indorses the note. The indorsee may, on nonpayment by the maker, sue the indorser, and his recovery will be the amount advanced by him and the interest thereon. In Cram v.

The right upon which such an action rests is that upon which actions for moneys had and received also rest. The first element of such actions is that money or property has been received by the defendant to which in equity and good conscience he is not entitled, and the court, in its remedy, aims to restore just the property received, neither more nor less. Thus, if the indorser proceeded against on the warranty is an accommodation indorser, he is not liable to parties privy to that fact, because there is no consideration to support the implied contract. To apply the test we have just given, an action for moneys had and received would not lie, and hence the accommodation indorser, for instance, is neither a guarantor of the genuineness of an instrument,[95] nor liable in damages where a warrantor would in other instances be. In case of the warrantor upon a consideration, the damages are measured between immediate parties by the actual loss suffered. In Delaware Bank v. Jarvis,[96] two courses are suggested: Where knowledge of the defect on the part of the warrantor can be shown, the bill or note may be returned as worthless, and an action may be commenced at once to recover back the money advanced upon it. This is for the reason that a contract procured by fraud may at once be rescinded by the injured party. The other course is to rely upon the warranty of the indorser, and, on being obliged to pay money or suffer loss, to hold the warrantor liable for damage incurred, including the costs incurred in defending the suit. In the case of an express indorsement, it is immaterial whether there is knowledge on the part of the warrantor or not. He is liable upon his contract of indemnity. The measure of his recovery here, also, is the value of consideration, irrespective of the face of the instrument. The consideration may always be shown between these immediate par-

Hendricks, the above case was cited upon a point similar, and the decision was to the same effect. 7 Wend. (N. Y.) 569; Ingalls v. Lee, 9 Barb. 647; Judd v. Seaver, 8 Paige, 548; Hutchins v. McCann, 7 Port. (Ala.) 94; Noble v. Walker, 32 Ala. 456; Raplee v. Morgan, 3 Ill. 561; Semmes v. Wilson, 5 Cranch, C. C. 285, Fed. Cas. No. 12,658; Bank of U. S. v. Smith, 4 Cranch, C. C. 712, Fed. Cas. No. 936. But see contra, Roark v. Turner, 29 Ga. 455; National Bank v. Green, 33 Iowa, 140; Durant v. Banta, 27 N. J. Law, 624.

[95] Susquehanna Valley Bank v. Loomis, 85 N. Y. 207.

[96] Delaware Bank v. Jarvis, 20 N. Y. 226; Mandeville v. Marvin, 30 Hun, 284.

ties, and the consideration proved always measures the amount of the recovery.[97]

These rules we have just given must be applied with caution. They are doubtless the settled law in case of warranties between immediate parties. But even between immediate parties there is not much business reason why the general rule of contracts should be departed from and the consideration returned rather than the contract performed. The effect of the consideration should be, as in other cases, only to make the indorser's promise of indemnity binding, and not to furnish a measure of damages. There is still less reason why the consideration should furnish a measure of damage between parties not immediate. As between them the consideration is not even open to inquiry.[98] And if it be true that the consideration is eliminated as an item of proof, it would logically follow that it would be eliminated as an item of damage also. In which case the other ground of damage—the promise of the indorser to pay the whole instrument—remains for the court to apply. There is privity of contract sufficient for this between remote parties because privity between immediate indorsers is carried forward through the chain of indorsements to the holder prosecuting; so that, in the phraseology of the old common-law remedies, debt would lie[99] as well as assumpsit for moneys paid out on account of the indorsement.[100] And thus the better reason seems, in case of parties not

[97] Brown v. Mott, 7 Johns. 361; Braman v. Hess, 13 Johns. 52; Rapelye v. Anderson, 4 Hill, 472; Wiffen v. Roberts, 1 Esp. 261; Livingston v. Hastie, 2 Caines, 248.

[98] Cram v. Hendricks, 7 Wend. 569; Munn v. Commission Co., 15 Johns. 44; Collier v. Nevill, 3 Dev. 31; Littell v. Hord, Hardin, 87; Cowles v. McVickar, 3 Wis. 725; Importers' & T. Nat. Bank v. Littell, 47 N. J. Law, 234.

[99] Onondaga County Bank v. Bates, 3 Hill, 53. In this case the court referred to the case of Wilmarth v. Crawford, 10 Wend. (N. Y.) 343, in which it had held that debt would lie by an indorsee against the maker of a note on the ground that, since the statute making promissory notes negotiable, the money payable thereby became, by virtue of the transfer, due and payable to indorsee or holder; and that, in judgment of law, privity of contract existed between the parties. See, also, Hodges v. Steward, 1 Salk. 125; Priddy v. Henbrey, 1 Barn. & C. 674; Stratton v. Hill, 3 Price, 253; Riddle v. Mandeville, 5 Cranch, 322.

[100] Barker v. Casidy, 16 Barb. 177.

immediate, to support the variation from the rule we have quoted, and to hold that as to them the face of the paper furnishes the measure of damages.[101]

ACCOMMODATION PARTIES AND PERSONS ACCOMMODATED.

81. AN ACCOMMODATION PARTY — Means a person who has signed a bill or note as acceptor or drawer, maker, or indorser, without recompense, and for the purpose of lending his name to some other person as a means of credit.[102]

82. The accommodated party impliedly contracts:

(a) That he will pay the bill or note.

(b) That he will repay the accommodation party for all loss incurred, if that party is compelled to pay in case of his default.

83. The accommodation party is liable to all parties except the party accommodated.

As between the accommodated and accommodation party, the paper is given gratuitously. Between them there is no binding contract, because the accommodation paper is not based upon a consideration. But subsequent parties, who discount the paper, are on a different footing. With them, not only the accommodated, but also the accommodation, party may be considered as entering into a contract upon a consideration received by the accommodated party only,[103] for the accommodation party has offered to all the world to loan his credit upon the instrument.[104] The parties who, subsequent to the offer, have either discounted the instrument or paid for it when due, have accepted that offer and paid for it, and may enforce it even though themselves subsequent accommodation par-

101 Mason v. Mason, 3 Cranch, C. C. 648, Fed. Cas. No. 9,245.

102 Benj. Chalm. Dig. art. 90; Byles, Bills, 131; Rand. Com. Paper, § 472; 1 Pars. Notes & B. 184.

103 Yeaton v. Bank of Alexandria, 5 Cranch, 49.

104 Meyer v. Hibsher, 47 N. Y. 265.

ties.[105] Thus, in accommodation paper there are three classes of relations to be considered:

(1) The liability upon the paper of the accommodated party to the accommodation party.

(2) The liability upon the paper of the accommodating party to the person for whose accommodation he has given it.

(3) The liability upon the paper of the accommodating party to all the other parties who take it.[106]

In case of a bill, if the acceptance be for the drawer's accommodation, the acceptor does not thereby become entitled to sue the drawer upon the bill. But when he has paid the bill, and not before, he may recover back the amount from the drawer in an action for money had and received.[107] This is equally the case with the accommodation maker of a note. He cannot sue the payee for whom he makes the accommodation. In either case, only the amount paid by the accommodation party can be recovered. The reason for this is that, the maker and acceptor of the instrument being the ultimate parties to it, when the instrument is paid by them it is extinguished, and no longer exists as a valid instrument. Therefore, the instrument not being in existence, the acceptor or the maker cannot recover upon the instrument itself.[108] The principle is the same when the accommodation party is subsequent to the party[109] for whom he gives the accommodation as where the accommodated party is the maker of a note and the accommodation party is payee. There, the instrument being without consideration as between the payee and the maker, the accommodation party cannot sue the accommodated party, because the instrument, as between

[105] Kelly v. Burroughs, 102 N. Y. 93, 6 N. E. 109.

[106] Hodges v. Nash, 43 Ill. App. 638, Johns. Cas. Bills & N. 153; Thatcher v. West River Nat. Bank, 19 Mich. 196; Warder v. Gibbs, 92 Mich. 29, 52 N. W. 73. The fact that a bill or note was accommodation paper furnishes no defense as against one advancing money upon it. Church v. Barlow, 9 Pick. (Mass.) 547; Thompson v. Shepherd, 12 Metc. (Mass.) 311; Shaw v. Knox, 98 Mass. 214; Fowler v. Strickland, 107 Mass. 552; Davis v. Randall, 115 Mass. 547. But see Quinn v. Fuller, 7 Cush. (Mass.) 224.

[107] Pearce v. Wilkins, 2 N. Y. 469.

[108] Griffith v. Reed, 21 Wend. 505; Young v. Hockley, 3 Wils. 346; Pomeroy v. Tanner, 70 N. Y. 547; Suydam v. Westfall, 2 Denio, 205.

[109] Van Duzer v. Howe, 21 N. Y. 531; Kitchel v. Schenck, 29 N. Y. 515.

them, is without consideration and a nudum pactum. The accommodated party can in no case look to the accommodation party, for the reason that the obligation, as between them, is without consideration and a nudum pactum; and also that the purpose of the instrument was that the accommodation party should give it "the security" of his name. This being the intention of the obligation, no action will lie in behalf of the party to whom accommodation is given.[110]

These relations between the accommodated and accommodation parties do not invalidate it as to third parties. Knowledge of the mere want of consideration between the original parties will not alone prevent the purchaser from becoming a bona fide holder.[111] Accommodation paper is daily placed in the market for discount or sale, and the indorsee or purchaser who knows that a bill or note was drawn, made, accepted, or indorsed without consideration is as much entitled to recover as if he had been ignorant of the fact.[112] The purchaser of accommodation paper with mere notice of the accommodation is a bona fide purchaser.[113] The bill is accepted or note made for the accommodation of another, for the purpose of furnishing a guaranty. The fact that all the world knows it was a guaranty without consideration is immaterial.[114] And if the ac-

[110] Jackson v. Warwick, 7 Term R. 121; Lancey v. Clark, 64 N. Y. 209; Knight v. Hunt, 5 Bing. 432; Sparrow v. Chisman, 9 Barn. & C. 241; Thompson v. Clubley, 1 Mees. & W. 212. In this action by an indorsee against the acceptor of a bill of exchange, it was held that the acceptor might show that the acceptance was for the accommodation of the plaintiff, and that he had received no consideration from the drawer, and also that it was agreed that when due, the bill should be taken up by the plaintiff.

[111] Fitch v. McDowell, 80 Hun, 207, 30 N. Y. Supp. 31; Palmer v. Field, 76 Hun, 229, 27 N. Y. Supp. 736.

[112] Moore v. Cross, 19 N. Y. 227; Meyer v. Hibsher, 47 N. Y. 265; Montross v. Clark, 2 Sandf. (N. Y.) 115; Lincoln v. Stevens, 7 Metc. (Mass.) 529; Stephens v. Monongahela Nat. Bank, 88 Pa. St. 163; Thatcher v. Bank, 19 Mich. 196; Jones v. Berryhill, 25 Iowa, 289; Cronise v. Kellogg, 20 Ill. 11.

[113] Grant v. Ellicott, 7 Wend. (N. Y.) 227; Brown v. Mott, 1 Johns. (N. Y.) 361; Montross v. Clark, 2 Sandf. (N. Y.) 115; Thatcher v. West River Bank, 19 Mich. 202; Charles v. Marsden, 1 Taunt. 224; Jones v. Berryhill, 25 Iowa, 289; Bank of Ireland v. Beresford, 6 Dow, 237.

[114] In the case of Grant v. Ellicott, 7 Wend. (N. Y.) 227, holding that, in an action by the payee against the acceptor, the fact of an acceptance being for

commodation party seeks a defense in saying that it is accommodation paper, it will not be necessary for the holder to show on his part in rebuttal that he gave value for it.

This rule is subject to modifications. In New York, for instance,[115] the authorities depart from the well-established and probably wiser English rule. An accommodation indorser is discharged by the transfer of a bill or note after maturity, because it is considered unfair to treat an accommodation indorsement as a continuing guaranty.[116] It was not the intention of the accommodation indorser to be liable upon his indorsement for all time. It was only his intention to give indemnity to such persons as took the bill or note during the time when, by its terms, it was supposed to circulate or, in other words, up to the time of the maturity of the instrument. And it would be contrary to the intention of the parties and unwarrantable to create extensions of time after the instrument had become due. This modification prevails in some other states.[117] It is in direct contradiction to the English and to the common-law rule.[118]

accommodation was no defense, the court cited the opinion of Lord Eldon in Smith v. Knox, 3 Esp. 46, to the effect that where an accommodation paper is sent out it is no answer, in an action upon such bill, that the acceptor accepted for the accommodation of the drawer, and that such fact was known to the holder. If a bona fide consideration were given, the holder could recover, though with full knowledge of the transaction. See, also, Charles v. Marsden, 1 Taunt. 224.

[115] Chester v. Dorr, 41 N. Y. 279.

[116] In the case of Chester v. Dorr, it was held that an accommodation indorser, without consideration, of a promissory note, is not liable to a transferee after maturity from the person for whose accommodation it was indorsed, although the transferee paid full consideration. The defense of want of consideration attaches after maturity, into whatever hands it may come. In the course of his opinion, Woodruff, J., said: "I deem the just view of the subject to be that when a note has become due, and is dishonored, the rights and responsibilities of the parties thereto, are fixed * * * and thereafter he who takes it takes it with knowledge of its dishonor, * * * and with just such right to enforce it as the holder had, and no other." Chester v. Dorr, 41 N. Y. 279. See also, Hascall v. Whitmore, 19 Me. 102.

[117] Bower v. Hastings, 36 Pa. St. 285; Barnett v. Offerman, 7 Watts, 130; Hoffman v. Foster, 43 Pa. St. 137; Battle v. Weems, 44 Ala. 105; Miller v. Larned, 103 Ill. 570.

[118] Charles v. Marsden, 1 Taunt. 224; Sturtevant v. Ford, 4 Man. & G. 101; Carruthers v. West, 11 Q. B. 143; Stein v. Yglesias, 3 Dowl. 252; First Nat. Bank of Salem v. Grant, 71 Me. 374, with note.

Another modification of this rule applying to immediate parties is in case of what is called "diversion." It often happens that one business man tells a second that he wants to borrow his credit for a specified purpose, and, to further that purpose, the second man accepts a bill, or makes or indorses a note for the first to discount. This arrangement amounts to an agreement between them that the instrument shall be devoted to that especial purpose. And the questions arising upon the diversion of accommodation paper are mainly whether the instrument has been used for the purpose for which it was given or not.

The cases make a distinction between material and immaterial diversion. A material diversion has these elements: (1) The accommodation party must have some interest in the application of the money raised on the bill or note. Unless he has, he is not in a position to object that there has been a misapplication of the paper on which he is the accommodation party.[119] (2) The accommodation bill or note must be made for some specific purpose, and be diverted to some other purpose.[120] An immaterial diversion is where an accommodation bill or note is made for the purpose of loaning the parties credit generally,[121] or where the substantial design for which the instrument was given is not departed from,[122] or where the agreement for which the instrument was given and which is broken is not one of substance and is unimportant. An immaterial diversion cannot avail as a defense. A material diversion is thus, in some respects, like a contract, based upon a consideration. There is some substantial interest at stake which makes it binding upon the accommodation party to carry out its purpose. If he fails to do this, the reason for its being given fails. It then becomes the duty of the accommodated party having it in possession to return it. The parties to it are discharged, because it is no longer a contract. If, in defiance of the agreement, the note is misapplied, then it is a

[119] Edw. Neg. Inst. § 451; Mohawk Bank v. Corey, 1 Hill, 513; Story, Bills, § 191; Dawson v. Goodyear, 43 Conn. 548; Quinn v. Hard, 43 Vt. 375; Fetters v. Muncie Nat. Bank, 34 Ind. 254.

[120] Bank of Rutland v. Buck, 5 Wend. 66; Kasson v. Smith, 8 Wend. 437; Spencer v. Ballou, 18 N. Y. 327; Woodhull v. Holmes, 10 Johns. 231.

[121] Cole v. Saulpaugh, 48 Barb. 104; Schepp v. Carpenter, 51 N. Y. 602.

[122] Bank of Chenango v. Hyde, 4 Cow. 567; Powell v. Waters, 17 Johns. 176.

fraud, which, as in the case of other contracts, vitiates the agreement between parties and privies, and against the defense of which the courts will allow no recovery.[123] The purchaser of accommodation paper obtained by fraud, deception, or fraudulently misapplied, with notice of these facts, is not a bona fide holder, but rather, if he attempts to recover upon the paper, is a partaker in the fraud.[124]

Carrying in mind that accommodation paper is a mere loan of credit, or, as it sometimes is put, a loan of money, the purchaser being the lender, and the seller of the paper the borrower,[125] it is easy to reach the next logical step in the theory. Where there is no limitation or restriction as to the manner in which accommodation paper is to be used, the accommodated party is at liberty to sustain his credit with it in any way he chooses. He may appropriate it to any purpose. In such a case there can be no substantial material diversion;[126] and, even when there is a departure from the express directions of the accommodation party in regard to the note, it will sometimes not amount to a material diversion. The accommodation party may, for instance, direct it to be discounted at one bank, and the accommodated party may discount it at another,[127] and generally, if the paper has accomplished the purpose in the minds of the

[123] Denniston v. Bacon, 10 Johns. 196.

[124] In the case of Small v. Smith, 1 Denio (N. Y.) 583, it was held that where accommodation paper had been negotiated in violation of an agreement between payee and maker, upon which agreement the payee had indorsed, the holder could not recover against such accommodation indorser, unless the note had been received in good faith, for a valuable consideration, and without notice of the agreement. Where the holder took such a note with notice of an agreement, he was held to have taken subject thereto. Wardell v. Howell, 9 Wend. 170; Brown v. Taber, 5 Wend. 566; Farmers' Bank v. Noxon, 45 N. Y. 762; Stoddard v. Kimball, 6 Cush. 469; Daggett v. Whiting, 35 Conn. 372; Evans v. Kymer, 1 Barn. & Adol. 528; Key v. Flint, 8 Taunt. 21; Gray v. Bank of Kentucky, 29 Pa. St. 365; Dunn v. Weston, 71 Me. 270; Hidden v. Bishop, 5 R. I. 29.

[125] Claflin v. Boorum, 25 N. E. 360, 122 N. Y. 385; Clark v. Sisson, 22 N. Y. 312; Newell v. Doty, 33 N. Y. 83.

[126] Cole v. Saulpaugh, 48 Barb. 104; Seneca Co. Bank v. Neass, 3 N. Y. 442; Grandin v. Le Roy, 2 Paige, 509; Mohawk Bank v. Corey, 1 Hill, 514; Agawam Bank v. Strever, 18 N. Y. 502.

[127] Powell v. Waters, 17 Johns. 176; Bank of Chenango v. Hyde, 4 Cow. 567.

parties at the time of giving the accommodation and answers the test that it has in no wise changed the responsibility of any of them, the diversion will be disregarded by the courts and deemed immaterial.[128]

[128] Duel v. Spence, 1 Abb. Dec. 559; Seneca Co. Bank v. Neass, 3 N. Y. 442; Duncan v. Gilbert, 29 N. J. Law, 521; Jackson v. First Nat. Bank, 42 N. J. Law, 178; Briggs v. Boyd, 37 Vt. 538; Dunn v. Weston, 71 Me. 270.

CHAPTER VI.

TRANSFER.

84. Definition.
85. Validity between Immediate Parties.
86. Methods of Transfer.
87. By Assignment.
88. By Operation of Law.
89-90. By Indorsement.
91. By Delivery.
92. Overdue Paper.

DEFINITION.

84. The transfer of a bill or note is either the assignment or devolution of the right to its enforcement.

Thus far we have been considering the two classes of contracts embodied in negotiable bills and notes. They are the contract embodied on the face of the bill and of the note, and the contract embodied in their acceptance and in their indorsement. We have examined the elements necessary to constitute each of those classes of contracts, and the nature and extent of the obligations that were assumed by their parties. And, because in this work we have only sought to apply these rules to negotiable bills and notes, in the outset we examined and discussed negotiability, its peculiar immunities, and the reasons for it, and in what ways negotiable instruments were distinguished from nonnegotiable ones.

The present chapter opens a new phase of the subject. The past chapters have sought to explain principally the legal rules which govern and the relations which are created by the fundamental contracts upon which the law of negotiable instruments rests. The future chapters seek to explain the rules which courts have enforced in the transfer of instruments, and particularly with reference to their circulation as an equivalent for money. The underlying problem before courts in laying down these rules has been to determine what was sound policy for a circulating medium, and

also what was just and equitable where interests and rights of parties to the instrument conflict. In this last respect the problem differs accordingly as the parties may have contracted directly with each other or as they may have acquired rights against other parties by virtue of the transfer of the instrument. For, as we have seen, in many instances parties by the transfer of the instrument become liable to or acquire rights against others of whom they have no knowledge or with whom they have had no business transactions. And since most relations of contract depend upon the theory that rights are acquired or liabilities are assumed by virtue of the express or the implied agreement of the person enforcing the right or against whom the right is enforced, it is obvious that some system different from that of the ordinary rules of contract must be developed. This system we shall examine by first investigating the nature of transfer, then the common defenses which arise in the circulation of the instrument and their effect in case of immediate and remote parties and lastly the unique position in contract of the purchaser for value without notice.

VALIDITY BETWEEN IMMEDIATE PARTIES.

85. As between immediate parties or parties privy, any cause which would invalidate an ordinary contract will invalidate the contract created by the transfer.

A negotiable instrument containing indorsements is an aggregate of independent contracts. It often evidences as many distinct business transactions as there are contracts. Each distinct transaction may be widely different from every other. And the legal relations of the parties created by every individual transaction may be as widely different as the transactions themselves are distinct. Ordinarily, the instrument itself shows the parties who participated in a single transaction. They are technically spoken of as "immediate parties." Parties who participated in different transactions are called "remote." Ordinarily, too, the instrument itself shows to which class these parties belong. The maker and payee of a note,[1]

[1] Puget de Bras v. Forbes, 1 Esp. 117; Jefferies v. Austin, 1 Strange, 674; Kennedy v. Goodman, 14 Neb. 585, 16 N. W. 834.

the drawer and acceptor of a bill,[2] the indorser and immediate indorsee of a note or bill,[3] the drawer and payee of a bill,[4] are immediate parties. The indorsee and maker of a note,[5] or the indorsee and one who is not his immediate indorser,[6] are remote parties. And the conclusion to be drawn from the instrument itself is that the maker and payee of a note, for instance, participated in one transaction, while the third and fourth indorsers participated in another, and perhaps a widely different one. This is merely a presumption, however, and not of very much effect. Sometimes the instrument does not show who are the immediate and who the remote parties. In such cases the ostensible and real relations of the parties may be shown. Thus, where an accommodation note was both made and indorsed for accommodation and then delivered, without consideration, to the plaintiff, the court said that the real relation of the parties could be shown, and that the lack of consideration between them was a complete defense.[7] The mere position of these parties on the paper, as not immediate, does not in fact make them so. And the true nature of the transaction can be given in evidence.

It once being determined whether the parties to an instrument between whom there is controversy are immediate or remote, it then becomes clear whether the general rules of law applicable to contracts, or the peculiar rules and equitable theories applica-

[2] Thomas v. Thomas, 7 Wis. 476.

[3] Easton v. Pratchett, 1 Cromp., M. & R. 798; Holliday v. Atkinson, 5 Barn. & C. 501. This was an action on a promissory note indorsed without consideration, and brought by the indorsee after death of the giver, against the executors, and the decision was against an action lying in such case, there being no legal consideration. Abbott v. Hendricks, 1 Man. & G. 791; Klein v. Keyes, 17 Mo. 326.

[4] McCulloch v. Hoffman, 10 Hun, 133. In this case, in which plaintiff was payee and defendant was drawer, it was held competent to prove certain facts and circumstances of Hoffman's signature, and that the subject of consideration might be inquired into, since the action was between the original parties.

[5] Burnes v. Scott, 117 U. S. 582, 6 Sup. Ct. 865; Chemical Electric Light & Power Co. v. Howard, 148 Mass. 359, 20 N. E. 92.

[6] Etheridge v. Gallagher, 55 Miss. 464.

[7] Powers v. French, 1 Hun, 582.

ble to negotiable bills and notes, apply. If the parties are immediate, and the controversy is between them as parties to a distinct contract, then any defense which is sufficient to prevent the enforcement of an ordinary contract will prevail.[8] To them the theories of the purchaser for value do not apply, for it is no part of the theory of negotiability that it should give immunity to the person who has procured the instrument through fraud or misrepresentation or duress, or through an illegal consideration, or who has found or stolen it. Negotiability, as a theory, only aims to protect innocent parties, who have taken the instrument in ignorance of the existence of these defenses, effecting some contract embodied in the instrument before the innocent party takes it. Therefore an immediate party to a contract who has been guilty of fraud, misrepresentation, and duress must suffer as against him upon whom he has committed such a wrong.

In general, where the parties are remote, then the theories of negotiability apply. The fact of importance in the doctrine of negotiable instruments is the presumption in favor of the purchaser for value without notice necessary to preserve the instrument as a circulating medium.[9] The remote party is one, who knows nothing of

[8] Lack of consideration, Murphy v. Keyes, 39 N. Y. Super. Ct. 18; Wilson v. Ellsworth, 25 Neb. 240, 41 N. W. 177; Kulenkamp v. Groff, 71 Mich. 675, 40 N. W. 57; Macomb v. Wilkinson, 83 Mich. 486, 47 N. W. 336. But see In re King's Estate, 94 Mich. 411, 54 N. W. 178; Thacher v. Dinsmore, 5 Mass. 299; Hodgkins v. Moulton, 100 Mass. 309; Black v. Ridgway, 131 Mass. 80. Duress, Clark v. Pease, 41 N. H. 414. Fraud, Vathir v. Zane, 6 Grat. 246; Rogers v. Morton, 12 Wend. 484. Illegality, Edmunds v. Groves, 2 Mees. & W. 642; Cummings v. Boyd, 83 Pa. St. 372; Wright v. Irwin, 33 Mich. 32; Bierce v. Stocking, 11 Gray (Mass.) 174. Loss or theft, Millis v. Barber, 1 Mees. & W. 425.

[9] It was held in an anonymous case that where a bank bill payable to A or bearer was lost, and was afterwards found by X, and was by him assigned to Y for value, who got a new bill in his own name, an action in trover for the first bill would not lie against Y. 1 Ld. Raym. 738. An action was brought against the acceptor by an indorsee, and the defendant offered to prove the drawer's name forged, but it was held that such proof would not be a defense against an acceptance which gave credit to the bill. Jenys v. Fowler, 2 Strange, 946. A note was made payable to J. C. in consideration of money given to be used in gambling, and indorsed by J. C. to the plaintiff for value. It was held that the plaintiff could not recover, even though he had no notice

the facts of defense which have arisen between immediate parties. He has not contracted with them, and is ignorant of their transactions. He is to be protected in paying money or giving value for the instrument from the wrong other parties have committed. The wrong which has tainted their contract does not vitiate his. He stands in the position of one fortified by the doctrines of equity, who will be protected by courts, because the loss was not occasioned by his act, but rather that of some prior party of whom he knows nothing.[10]

Bills and notes are of that species of personal property called choses in action. They are orders or promises to pay money at some future time to which commercial usage has given a present value by means of the process of discount. Just as any tangible

of the use to which the money had been put. Bowyer v. Bampton, Id. 1155. In Grey v. Cooper, an action by indorsee against the drawer of a bill, payable to W., who in turn indorsed it to another, and which finally came into possession of plaintiffs by indorsement, it was pleaded in defense that the payee was an infant. Held, that the drawer was charged, on the ground that, according to the bill, he engaged to pay to the order of the payee, whoever that might be. 3 Doug. 65. In Smith v. Chester, it was held that an indorsee in an action against an acceptor, must prove the handwriting of the first indorser, as a bill would be no payment to the one in whose favor it was drawn, unless indorsed by him. 1 Term R. 654.

[10] In Prouty v. Roberts the action was upon a note payable to D. W. or order, signed by defendant, and indorsed by D. W. It was claimed by defendant that there had been no legal transfer of the note, as it had been obtained by H. & F. under false representations, and that the plaintiff took the note with knowledge of the facts. It was held that the plaintiff proved a legal title to the note, and the facts stated by the defendant were no defense if proved. The plaintiff was called upon to pay only what he had agreed, and payment to the plaintiff discharged the debt. 6 Cush. (Mass.) 19. In Lowe v. Waller an action was brought against the acceptor of a bill, of which the indorser, L., was also the maker and payee. This bill was indorsed to H. & S., by whom it was indorsed to plaintiff. It was pleaded that the bill was upon a usurious contract between defendant and H. & S. In accordance with the principle laid down in Bowyer v. Bampton, this was held a good defense. 2 Doug. 736. In Duncan v. Morrison it was held that an assignee of note or bill not mature takes free from defenses of which he has no notice. Breese (Ill.) 151. To the same effect, see Murray v. Beckwith, 81 Ill. 43; Cook v. Norwood, 106 Ill. 558; Vanliew v. Second Nat. Bank, 21 Ill. App. 126; Miller v. Larned, 103 Ill. 562; Smith v. Livingstone, 111 Mass. 342; Gilson v. Stevens Manuf'g Co., 124 Mass. 546.

property so are they bought and sold in the financial market; but they differ from tangible property in their sale, in that the transfer of one is effected by the delivery of the thing itself, while with bills and notes merely the right to enforce the payment at some future time generally passes to the purchaser. In other words, the transfer of commercial paper depends upon the theories of assignment or devolution of contract right, and not upon the principles of bargain and sale. And if in the bill or note there is present the element of negotiability then these doctrines are extended or modified by those of negotiability. Thus title to a negotiable instrument may be acquired either through assignment, devolution of interest, or negotiation. By title is meant the right to enforce the instrument itself. The student is to observe that the transfer of title means not only the transfer of absolute ownership, but it means something more. Unquestionably the full and absolute owner and holder of a bill or note may enforce it, but he is not the only person who can do so. Any one who has the legal or equitable title to the instrument, or is its holder with authority to bring an action upon it, is a transferee of title within the meaning of the rule.[11] A great many cases go to the extreme of saying that the transfer will be effectual; and the right of action complete, if brought by a person who has no interest in a bill or note whatever.[12] But this is more than questionable

[11] Where a plaintiff brings the note declared on, and offers it in evidence, this is not only evidence that he is the bearer, but also raises a presumption of fact that he is the owner, and this will stand as proof of title until other evidence is produced to control it. Ordinarily such bearer, relying on the general presumption, has no means of proving the transfer to himself. Shaw, C. J., in Pettee v. Prout, 3 Gray (Mass.) 502.

[12] Gage v. Kendall, 15 Wend. 640. In this case a note was made by Gage payable to W. C. or bearer, and this was declared on by K. as bearer. Gage offered to prove that plaintiff at the commencement of the suit, having transferred his interest, had no title or interest in such note. Evidence to this effect was rejected by the court. The case was appealed, and the judgment affirmed. In Robinson v. Crandall, the notes on which the action was brought were made by defendants, payable to H. W. or bearer. Upon death of payee the plaintiffs, his administrators, declared on the notes as bearers. It was objected that, as no assignment had been made, not even the administrators could maintain the action. It was held that, being the real owners of the notes, they had the right to declare and recover as bearers, and that it did not lie with defendants to object to the plaintiffs' want of interest. 9

law, and to offset this sweeping assertion it may be said with equal certainty that the law is settled that if a plaintiff has no interest in or possession of commercial paper he cannot maintain an action upon it.[13] But if a plaintiff has possession of commercial paper the question of his being the legal transferee of title does not depend alone upon his absolute ownership of the bill or note. He is the legal transferee if, coupled with his possession, there is in him any right of possession, irrespective of the fact that his interest in the instrument has or has not value. If the title and transfer are merely colorable, and such as to bar another action against the defendant upon the instrument, it is sufficient.[14] The absolute owner may lawfully constitute any third person the holder for the purpose of suing upon it. And the rights and equities of the holder and the person bringing the action are entirely immaterial to the defendant or person liable, so long as, in making payment of the bill or note, he pays it once for all.[15] The court will not therefore inquire into these equities and find in them a defense for the person

Wend. (N. Y.) 425. Mauran v. Lamb, 7 Cow. 174; Hartwell v. McBeth, 1 Har. (Del.) 363; Lewis v. Hodgdon, 17 Me. 267; Gray v. Wood, 2 Har. & J. (Md.) 328; Hodges v. Holland, 19 Pick. 43.

[13] In the case of Emmett v. Tottenham, a bill was indorsed in blank by payee to one R., who discounted it, and the bill was afterwards indorsed by R. to W. by delivery. Upon the death of W. his executor desired R. to bring suit in a third party's name. At the request of R., E., having copied the bill and returned original to the executor, brought suit. It was held that, as E. did not have possession of the bill when the trial began, he had not title to support the action, for there was no evidence that he had any interest in the bill. 8 Exch. 884. Coleman v. Biedman, 7 C. B. 871; Moore v. Maple, 25 Ill. 341; Watson v. New England Bank, 4 Metc. (Mass.) 343; Hovey v. Sebring, 24 Mich. 232.

[14] Green v. Swink, 9 N. Y. St. Rep. 646.

[15] In Ord v. Portal, where indorsees sued on a bill drawn to the maker's order and indorsed by him in blank, it was objected that there was no evidence that the bill had been indorsed to the three plaintiffs. It was held that an indorsement in blank conveyed a joint right of action to as many as agreed in suing on the bill. 3 Camp. 239. In Grimes v. Piersol, it was shown that Grimes had assigned a note to one Benton, and that the latter's name had been erased and the name of Piersol inserted. It was held that in such a case, the assignee or his vendee could not, without consent of assignor, strike out the name of assignee and insert that of the vendee so as to enable the latter to maintain a suit against the assignor. 25 Ind. 245.

liable. They will not ask in whom the property of the instrument may be, so long as the legal title is in the holder who has it in his possession, having a right to it.[16] If such person has not its full legal property, he may nevertheless recover as an agent authorized to collect the bill or note, and acquit the persons liable upon its payment to him, or, in other words, he may recover as the trustee of an express trust.[17]

The doctrine thus laid down has been complicated and confused, but not substantially changed, by the enactment of the various Codes to the general effect that every action must be prosecuted in the name of the real party in interest, except that an executor, administrator, or trustee of an express trust may sue without joining with him the person for whose benefit the action is brought. The mere holder of a bill or note, who has no interest in it, is clearly not the real party in interest, and cannot in the Code states maintain an action as such upon it.[18] But the courts have construed this section to mean that it is still ordinarily no defense to a party

[16] Strong v. Tompkins, the plaintiff, who was a deputy sheriff, brought suit on a promissory note indorsed to him and taken by him instead of bail, and by way of indemnity. Under the statute making void all such agreements by such officers, the plaintiff was held not to be the legal holder, and so not entitled to sue. 8 Johns. 76.

[17] Law v. Parnell, 7 C. B. (N. S.) 282. In this case, B., the payee, indorsed in blank a bill to a bank. The plaintiff, who was the bank's manager, and who was intrusted with care of such security, brought suit against the defendant, who was the acceptor, and who claimed that the suit should have been brought by all the shareholders. It was held that the bank might constitute anyone the holder of a note indorsed in blank, for the purpose of suing upon it. 7 C. B. (N. S.) 282. In Foss v. Nutting, it was held that where an assignment without indorsement, was made of a promissory note, payable to order, in a state where "every action must be prosecuted in the name of the real party in interest," such provision would not bar an action in another state in the name of the payee. 14 Gray (Mass.) 484; Lovell v. Evertson, 11 Johns. 52; Haxtun v. Bishop, 3 Wend. 13; Guernsey v. Burns, 25 Wend. 411; Ancona v. Marks, 7 Hurl. & N. 686; Jenkins v. Tongue, 29 Law J. Exch. 147; Orr v. Lacy, 4 McLean, 243, Fed. Cas. No. 10,589; French v. Jarvis, 29 Conn. 347; Laflin v. Sherman, 28 Ill. 391; La Coste v. De Armas, 2 La. 263; Southard v. Wilson, 29 Me. 56; Little v. O'Brien, 9 Mass. 423; Brigham v. Marean, 7 Pick. 40; Brigham v. Gurney, 1 Mich. 349.

[18] Parker v. Totten, 10 How. Prac. 233; Clark v. Phillips, 21 How. Prac. 87.

sued upon commercial paper to show that the transfer under which the plaintiff holds it is without consideration or subject to equities between him and his assignor, or colorable or merely for the purpose of collection or to secure a debt contracted by an agent without sufficient authority. It is sufficient if the plaintiff have the legal title, either by written transfer or delivery, whatever be the equities between him and his assignor. But he must have the right of possession, and ordinarily be the legal owner. Such ownership may be as an equitable trustee, or it may have been acquired without adequate consideration, but it must be sufficient to protect the defendant upon a recovery against him from a subsequent action by the assignor.[19] Thus a receiver may sue,[20] but an agent to collect may not, because he has neither the legal title nor is the trustee of an express trust,[21] although, if the agent were named as payee in the note, he would be the trustee of an express trust.[22] But a donee may sue, because the legal title passes by gift, irrespective of the question of consideration;[23] or a person holding collaterals for the benefit of creditors, because the legal title passes by assignment, and he also is a trustee of an express trust;[24] and each and all of these persons may legally discharge the liability of the defendants upon the instrument.

METHODS OF TRANSFER.

86. There are four methods of transfer:

(a) By assignment.

(b) By operation of law.

(c) By indorsement.

(d) By delivery.

[19] Hays v. Hathorn, 74 N. Y. 486; Eaton v. Alger, 47 N. Y. 345; Webb v. Morgan, 14 Mo. 428; Boyd v. Corbitt, 37 Mich. 52.

[20] Merchants' Loan & Trust Co. v. Clair, 36 Hun, 362.

[21] Iselin v. Rowlands, 30 Hun, 488.

[22] Hollingsworth v. Moulton, 53 Hun, 91, 6 N. Y. Supp. 362; Hoxie v. Kennedy, 10 N. Y. St. Rep. 786.

[23] Pritchard v. Hirt, 39 Hun, 378.

[24] Nelson v. Edwards, 40 Barb. 279.

SAME—BY ASSIGNMENT.

87. A bill or note may be transferred by assignment as distinguished from a negotiation.

We have already seen that transfers in the form of words commonly used for an assignment when written on the bill or note are construed as indorsements and not as assignments, unless the intention between the parties plainly is to treat them as an assignment in distinction from an indorsement. See supra, pp. 105 to 110. But where such form of words is not written on the instrument, but is found in a separate paper, and from its phraseology is clearly meant to transfer title, the plain intention of the parties is enforced and the title vests in the transferee by operation of assignment.[25] So where a bill or note which can only be transferred by indorsement, is transferred without indorsement, yet with intention to vest title, or where a bill or note indorsed in blank or payable to bearer is delivered, as we shall see in the later sections of this chapter, the title vests by assignment, and is different in its legal effects from that passing on indorsement, or according to the doctrines of negotiability. And this raises the question of title conferred by an assignment.[26]

[25] Examples are: An order by the payee of a note on the maker to pay over proceeds to some one, Noyes v. Gilman, 65 Me. 589; a transfer of a note or bill by deed, McClain v. Weidemeyer, 25 Mo. 364; in assignment by a separate writing, Morris v. Poillon, 50 Ala. 403; an order by a holder to his collecting agent to pay over proceeds, Gayoso Sav. Inst. v. Fellows, 6 Cold. (Tenn.) 467; a bond by the payee of a note in which he includes the note, Crosby v. Roub, 16 Wis. 645.

[26] In Hodges v. Steward, 1 Salk. 125, "a difference was taken between a bill payable to J. S. or bearer, and J. S. or order; for a bill payable to J. S. or bearer is not assignable by the contract. * * * But when the bill is payable to J. S. or order, there an express power is given to the party to assign, and the indorsee may maintain an action." The bearer of a note payable to a particular person or bearer cannot maintain an action thereon in his own name against the maker. Nicholson v. Sedgwick, 1 Ld. Raym. 180. Before the passing of the statute 3 & 4 Anne, c. 9, a promissory note was not assignable or indorsable over within the custom of merchants. Buller v. Crips, 6 Mod. 29. As to whether inland bills only were contemplated by this statute, see Milne v. Graham, 1 Barn. & C. 192. In the case of Lodge v. Phelps, the question arose as to whether the assignee of a promissory note

The assignment of an ordinary contract right means that the party holding the right drops out of the contract and another takes his place. The assignee is substituted in place of the assignor. And that the student may better understand the matter, we will say that the assignee, and every subsequent person to whom the contract comes by assignment, may be considered as the person who made the contract in the first instance, and as having said and done everything in making the contract which the original assignor said or did. Hence if the original assignor said or did something which under the ordinary law of contracts would prevent him from enforcing the contract, or asserting his right against the other party to the original contract, the assignee, although he knows nothing of the original transaction, may be deemed to have said and done the same things. And further, if any subsequent assignee from whom, as an assignor, the holder in turn derives the contract, has done anything to prevent its enforcement against the original party, the last holder cannot enforce it against the original party. Each assignee takes his chances as to the exact position in which any party making an assignment of it stands.[27] And as it is called in law, the assignee takes the contract subject to equities. By this is meant a set-off,[28] or a fraud,[29] or any defense to the contract which would avail in favor of the original party up to the time of the notice of the assignment given to the person against whom the contract is sought to be enforced. A subsequent indorsement also cuts off these

given in Connecticut, where such assignee could not maintain an action in his own name, might so maintain such action in New York. It was held that the action might be brought in the assignee's own name, but allowing the defendant every defense to which he would have been entitled in New York. 2 Caines, Cas. 321.

[27] Crouch v. Credit Foncier, L. R. 8 Q. B. 386; Mangles v. Dixon, 3 H. L. Cas. 735; Littlefield v. Bank, 97 N. Y. 581; Callanan v. Edwards, 32 N. Y. 483; Kleeman v. Frisbie, 63 Ill. 482; Willis v. Trambly, 13 Mass. 204; Spinning v. Sullivan, 48 Mich. 5, 11 N. W. 758; Lane v. Smith, 103 Pa. St. 415; Shade v. Creviston, 93 Ind. 591; Warner v. Whittaker, 6 Mich. 133.

[28] Zabriskie v. Railroad Co., 131 N. Y. 72, 29 N. E. 1006; Wood v. Mayor, etc., of New York, 73 N. Y. 556; Massachusetts Loan & Trust Co. v. Welch, 47 Minn. 183, 49 N. W. 740; McKenna v. Kirkwood, 50 Mich. 544, 15 N. W. 898.

[29] Graham v. Johnson, 38 Law J. Ch. 374; Holbrook v. Burt, 22 Pick (Mass.) 546.

equities, as appears by the rule set forth further on, that when an indorsement is subsequently made on an assigned negotiable instrument, all defenses are cut off from the time of the indorsement. For the chief difference between an assignment and a negotiation is, as already explained (see supra, pp. 8 to 13), that the negotiable contract can be enforced by the transferee, without previous notice to the contractor, and without the risk of being met by defenses which would have been good against the assignor.

SAME—BY OPERATION OF LAW

88. The full title to a bill or note passes without either assignment, indorsement, or delivery by operation of law, and either by

(a) The death of the holder, where the title vests in his personal representative, or

(b) The bankruptcy of the holder, where the title vests in his assignee, or

(c) In some jurisdictions, where the holder is an unmarried woman, on her subsequent marriage the title vests in her husband, or

(d) In some jurisdictions the title to a bill or note transferred to a married woman vests in her husband, or

(e) Upon the death of a joint payee or indorsee the title vests at once in the survivor or survivors.

By "operation of law" is meant that in the cases above specified the law implies a transfer where there is none by act of the parties. The rules of law themselves operate as the transfer. The position, rights and liabilities of the executor, administrator and trustee have been already sufficiently explained. The position, rights and liabilities of an assignee in bankruptcy are similar to theirs because in most respects he is but an ordinary trustee. As regards the position of married women at common law, there is not much to be said, because in England and in almost all our states the common law has

been abrogated by statutes abolishing most of the old rules. These rules were that at common law a married woman, though she might have contracted as feme sole, was nevertheless by marriage disabled from acquiring the benefits under the contract. These belonged conditionally to her husband. If he reduced them to possession, they were his absolutely. If he did not reduce them to possession, on his death they survived to her if alive, but, if dead, to her representatives. These rules were operative in case of bills and notes whether made payable to or indorsed to a married woman. And during the marriage, the husband was for all purposes deemed to be the holder of the instrument payable to the order of the wife, whether it was made payable to her before or after marriage. As regards the joint payee or indorsee, the rule stated in the text is the statement of the contract rule of survivorship, perhaps the principal characteristic of the doctrine of joint right. By this is meant that the order in the bill or indorsement and the promise in the note is made to all the promisees, not as separate individuals, but as one legal entity. We may liken them in their being but one party in ownership to a corporation which may be composed of many individuals, yet acts as one, and which in case of the death of some of its members still exists and acts through the survivors. So with joint payees or indorsees, the right does not descend to representatives, but passes on or is transferred to the survivors, who have the title to it and are entitled to enforce it.

The title in all these cases received by the transferee, is only that held by the transferror, because this devolution of interest by operation of law is but an assignment of that interest. The executor, administrator and assignee in bankruptcy merely stand in the place of the original owner and can have no better position than he had.[82] They pay nothing for the paper, neither do they take it in any commercial transaction, but it comes to them as part of the holder's property, to be collected and paid over to the creditors of the holder or persons entitled to it. And this also is the principle governing in the reduction to possession by a husband of the choses in action of a wife,[83] and in the case of the survivor of joint owners.[84]

[82] Billings v. Collins, 44 Me. 271.

[83] Daniel, Neg. Inst. §§ 257, 258.

[84] Daniel, Neg. Inst. §§ 1182, 1183, 1183a.

SAME—BY INDORSEMENT.

89. The legal title to an instrument made payable to order can regularly be transferred only by indorsement.

90. The transferee of an instrument made payable to order without indorsement is the equitable owner, and takes it subject to all the equities vested in prior parties.

The facts which determine whether or not the instrument is to be transferred by indorsement are the terms of the face of the instrument. If the instrument be to order, then it was in contemplation of the parties that the money called for was to be paid to the payee, or to some person to whom he would direct it to be paid.[25] It would be a violation of the terms of the contract to pay it otherwise. For the meaning of the words "or order" is that the original parties intended in the first place that the instrument should pass from the payee to some person, they did not know whom, and on again from him to another, who in turn should transfer it. They therefore may be deemed to promise to pay its amount to any one whatever, provided only that such person can show an order for its payment. And thus, as we have seen (see ante, p. 105), it is immaterial whether the indorsement contains words of negotiability or not.[26] But the only method by which this order can be evidenced is an indorsement,[27] although the indorsement may have various forms, and be made sometimes by the payee or

[25] Cock v. Fellows, 7 Johns. 143; Hedges v. Sealy, 9 Barb. 214. A note by R. B. & A. G., payable to J. B., was indorsed thus: "Pay the within to J. R. [Signed] J. B." It was held that the legal ownership of the note was not transferred to J. R. by this indorsement, so as to authorize him to maintain a suit upon the note in his own name against the makers. Robinson v. Brown, 4 Blackf. (Ind.) 128.

[26] More v. Manning, Comyns, 311; Edie v. East India Co., 1 Wm. Bl. 295, 2 Burrows, 1216; Leavitt v. Putnam, 3 N. Y. 494.

[27] In the case of Bryant v. Eastman, where one who was carrying on business for himself, but in the name of a company which had not been organized, though incorporated, received as payment for a debt due him in such business a note payable to the order of the company; it was held that such person might transfer the note by indorsing it in his own name. 7 Cush.

indorsee and sometimes by persons upon whom their interests devolve.[88] And the words or order are construed as an express power given the payee to assign only in case the payee evidences his assent to the transfer by his indorsement.[89]

There is a large class of cases where, through accident, forgetfulness, mistake, or some other cause, a negotiable instrument is transferred in good faith, but without the indorsement of the per-

(Mass.) 111. Warder, Bushnell & Glessner Co. v. Gibbs, 92 Mich. 29, 52 N. W. 73; Rand. Com. Paper, § 700; Byles, Bills & N. pp. 2, 151; Daniel, Neg. Inst. §§ 663, 664.

[88] The various forms are arranged as follows: (1) If payable to A, A must indorse. (2) If payable to A, and he is dead, B, as executor of A, must sign. Thus, in the case of Stone v. Rawlinson, it was held that the executor or administrator of a person to whom or whose order a bill is payable has the absolute property in such bill, and may assign it to whomsoever he pleases, and such assignee may maintain an action in his own name. Willes, 559. (3) If payable to A, and he is bankrupt, B, as assignee of A, must sign. Thus, in Wallace v. Hardacre, the defendant accepted a bill, drawn by E. M., and by him indorsed to the plaintiff. It was claimed as defense that E. M. was bankrupt before delivery of bill to plaintiff, and could convey no interest. It was held that the bill was available in the hands of a holder for value, and the defense was not good against him, though it might have been as against an orginal party. 1 Camp. 45. (4) If payable to A, B, C, and D, executors of A, all must sign. (5) If payable to A, wife of B, B must sign. Thus, a note was made payable to "Mrs. Carter or order," and was indorsed by her in the name of "M. Carter." It was held, in an action by the indorsee, that in case of such a note, indorsed by a married woman in her own name, where the maker afterwards promises to pay, it will be presumed that the nominal payee had authority from her husband to indorse in such form, and a legal title will be invested in the plaintiff. Cotes v. Davis, 1 Camp. 485. In Mason v. Morgan, a note was made by the defendant to a married woman, and it was indorsed to the plaintiff by the husband alone. Such indorsement was held sufficient where the one taking such an instrument had satisfied himself that he took from the actual owner. 2 Adol. & E. 30. (6) If payable to A, B, C, and D, a copartnership, any member by the firm name may sign. Thus, a note was made payable to E. & R. or order, was indorsed by R. in his own name to his partner E. It was held that the indorsement should have been in the partnership name. Estabrook v. Smith, 6 Gray (Mass.) 570. (7) If payable to A, B, C, and D, not partners, all must sign. Thus, a bill payable to father and son, not partners, was indorsed by the son alone. Such indorsement was held not good, as both payees should have indorsed. Carrick v. Vickery, 2 Doug. 653n.

[89] Nicholson v. Sedgwick, 1 Ld. Raym. 180; Hodges v. Steward, 1 Salk. 125.

son to whose order it is made. It is true that an indorsement of an instrument and an assignment of it such as we have been endeavoring to explain are widely distinct. But the statute of Anne, while it distinguishes between them, recognizes the latter method as one competent to transfer the instrument itself.[40] For the instrument, while it can only be negotiated by indorsement, is none the less assignable as a chose in action. Its very terms, which make it payable to order, make it also assignable, with the difference that an indorsement is a negotiation, and carries with it the full, legal title, and the assignment carries with it only the equitable one.[41] And it was the doctrine of the courts of equity, as distinct from those of the common law, that, inasmuch as property in equity could be assigned without a writing,[42] and merely by delivery, with an oral agreement and an intent to assign, therefore a court of equity would treat a delivery of the bill or note payable to order, without indorsement, as an assignment of it, or a transfer of the title of the bill or the note and all interest in it. And because it was only the courts of equity which would treat it as such an assign-

[40] Watkins v. Maule, 2 Jac. & W. 237. In this case an accommodation note, payable to R. S. or order, was drawn and signed by H. R. S. sent this note to D., T. & Co., to secure advances made to him, without indorsing it. The note was paid by H.'s bank, but on his objection, D., T. & Co. returned the money, on a promise by H. that if certain mortgages on property of B. S., held by D., T. & Co., were insufficient, he would pay. The estates were not sufficient, and R. S. became bankrupt. On suit, being brought, H. agreed to execute bond, but, before doing so, died. E. D., of D., T. & Co., as administrator of R. S., indorsed note to his own firm, and H.'s representatives were sued. It was held that, as the equitable interest had passed by delivery, the holders might have called upon the bankrupt to indorse, and that the formal act of indorsement by the administrator was proper. Compare with this the case of Edge v. Bumford, where a bill was drawn by R. and accepted by defendant. R. gave the bill, without indorsement, to the plaintiff. Upon its return to R. by the plaintiffs to be indorsed, he burned the bill. R. becoming bankrupt, the defendant refused to pay, and suit was brought against him. It was held that such a bill could not be maintained, as equity could do no more than to entertain a bill to compel indorsement, but, as in this case that would have been of no effect, there was no remedy. 31 Law J. Ch. 805; Harrop v. Fisher, 9 Wkly. Rep. 667, 10 C. B. (N. S.) 196.

[41] Freund v. Importers' & Traders' Nat. Bank, 76 N. Y. 352; U. S. v. White, 2 Hill, 59.

[42] Briggs v. Dorr, 19 Johns. 93.

ment, and vest the interest and right to the bill or note in the transferee, therefore a corresponding equity would admit of reasons or defenses to show why the bill or note should not be paid.[43] Hence the doctrine that a transferee of a note made payable to order without indorsement takes it subject to all equities attached to the note;[44] and this although the bill be subsequently ratified and in other respects the holder was a bona fide holder for value. This doctrine only goes to this limit that equities are admitted. The transferee stands in the position of an assignee. He owns the note. He, in turn, may transfer it, but he owns it and transfers it subject to the rules applicable in case of an assignment of any other chose in action.

But it would not be just in all cases to apply this doctrine, and accordingly we find that equity has modified it. It might be that it was intended to indorse it at the time of transfer, but through accident or mistake the indorsement was omitted. It might be that indorsement was promised at some future time, or that an indorsement was made after transfer and after equities had accrued. In such cases it seems to be a legitimate inference from the leading case on the subject[45] that if it was intended to indorse the instrument at the time of transfer, and the holder was in other respects a purchaser for value without notice before maturity, equity will consider as done that which ought to have been done, and treat the indorsement as merely a formal act and the transferror as bound to substantiate the right of the transferee. The indorsement once made, equity will consider it as valid as if indorsed at first,[46] and treat the equities as shut off, because in view of equity the indorsement was made at the time of transfer.[47] As it is commonly phrased, the subsequent indorsement relates back

[43] Muller v. Pondir, 55 N. Y. 325; Savage v. King, 17 Me. 301; Calder v. Billington, 15 Me. 398; Southard v. Porter, 43 N. H. 379.

[44] Hedges v. Sealy, 9 Barb. 214; Goshen Nat. Bank v. Bingham, 118 N. Y. 349, 23 N. E. 180; Lancaster Nat. Bank v. Taylor, 100 Mass. 18; Clark v. Callison, 7 Ill. App. 263; Haskell v. Mitchell, 53 Me. 468; Clark v. Whitaker, 50 N. H. 474; Trust Co. v. National Bank, 101 U. S. 68; Osgood v. Artt, 17 Fed. 575.

[45] Watkins v. Maule, 2 Jac. & W. 237.

[46] Anon., 1 Camp. 492, note.

[47] Southard v. Porter, 43 N. H. 380; Haskell v. Mitchell, 53 Me. 468.

to the time of transfer, and the holder stands as a purchaser for value without notice. But the reason of this rule fails where there was no promise to indorse at the time of transfer,[48] or where the purchaser is not one before maturity,[49] or where it attempted to ratify an indorsement made by an agent without authority,[50] or, generally speaking, in any case where the equities have accrued prior to the time of the promised indorsement, except those prior to transfer, where indorsement was intended at the time of transfer. In such cases the equities are against the transferee, because, the transfer in the first instance being an assignment, the equities are equal, and thus the rule obtains that he who is first in point of time will secure the advantage. There is no element of promise present to constitute, as in other cases, a superior equity, and therefore the equities of those possessing defenses will prevail against the indorsee by an indorsement subsequent to the transfer, and be admitted against him when he seeks to enforce the instrument.

SAME—BY DELIVERY.

91. When the note or bill is made or becomes payable to bearer, it is transferable by delivery without indorsement.

A note payable to bearer and an indorsement in blank are, in legal effect, the same. The contract in the case of the note payable to bearer imports that the maker or acceptor is willing to pay any one who may have it in his possession. The indorsement in blank signifies the same thing with regard to an indorser making it.[51] And the holder of both an instrument payable to bearer and

[48] Lancaster Nat. Bank v. Taylor, 100 Mass. 24; Clark v. Whitaker, 50 N. H. 474.

[49] Haskell v. Mitchell, 53 Me. 468.

[50] Gilbert v. Sharp, 2 Lans. 412.

[51] See, supra, p. 110. In Smith v. Clarke, Peake, 295, it was held that, when the payee of a bill of exchange has made an indorsement in blank thereon, no subsequent indorsee can restrain its negotiability by a special indorsement. By the law of France an indorsement in blank does not transfer any property in a bill of exchange. Trimbey v. Vignier, 1 Bing. N. C. 151.

one indorsed in blank may transfer the instrument without indorsement.[52] Such a transfer is not wholly a negotiation, but is more in the nature of an assignment. By this is meant only to say that it transfers the legal title to the instrument, but except in case of the waranties already specified (see supra, p. 159) it imposes no liability upon the transferror; for bills made payable to bearer are negotiable at common law, and notes so made payable are recognized by the statute of Anne;[53] and bills or notes to pay A or bearer are interpreted to be contracts to pay the person so mentioned, or the person to whom he may deliver the instrument. The phrase "bearer" is a descriptio personæ for the legal possessor,[54] and the transfer of title according to the terms of the original instrument is therefore predicated upon delivery alone. "The court," says Mr. Daniel,[55] "treats notes payable to bearer as if there were a direct line of contract between the maker and the holder, by whatever successive stages of transfer he may have derived it; and it is correct to hold the maker in direct contract with him, provided he becomes the bearer bona fide. He need not trace title through his predecessors, as possession is presumptive evidence of his right." But it is evidently the intention of the courts to construe this contract subject to the implied condition that the maker or acceptor will pay only the bona fide possessor. In other words, the original parties may be deemed to say, "We will not restrict the payment of this instrument to any particular person, but will pay it to anybody,[56] provided such person be the bona fide holder." They therefore may be deemed to contract that the instrument may be

[52] Bitzer v. Wagar, 83 Mich. 223, 47 N. W. 210.

[53] In De La Chaumette v. Bank of England it appeared that a certain bank note had been stolen, and afterwards came into the possession of a party in France, who, in the course of business, sent the same to England. By the desire of the one from whom the note had been stolen, it was converted by the bank. In an action of trover, it was decided that by the statute of Anne such notes were negotiable, just as were inland bills, and thus delivery to a bona fide holder for consideration gave a good title as against original holder. 2 Barn. & Adol. 385.

[54] Grant v. Vaughan, 3 Burrows, 1516.

[55] Daniel, Neg. Inst. footnote to § 729.

[56] Bank of Kentucky v. Wister, 2 Pet. 318; Town of Thompson v. Perrine, 106 U. S. 593, 1 Sup. Ct. 564, 568; Thomson v. Lee Co., 3 Wall. 327.

transferred subject to the rights and immunities of the transfer of an instrument transferred by negotiation, and that the transferee should have rights of an indorsee for value and without notice, so far as the admission of equities is concerned.[57] And the only difference between the transferror by delivery and the indorser is that the transferror declines to obligate himself to the liabilities of an indorser by declining to indorse, and the transferee relies on the instrument itself by not requiring an indorsement. The transferror, unless he violates an implied warranty, cannot therefore be compelled to refund the money for which he sold the bill or note if it prove uncollectible. Of this fact the transferee takes the risk on himself,[58] for he might, by requiring an indorsement, acquire all the right acquired by negotiation.[59] But in other respects he derives the benefit of all the rights his transferror or prior parties have acquired; he derives any benefit that may come from a purchase in due course for value and without notice, and thus is freed from liability to defenses.[60]

OVERDUE PAPER.

92. Negotiable paper may be transferred by indorsement or delivery when overdue.

A bill or note does not lose its negotiability by dishonor;[61] and yet, by a curious anomaly as regards parties prior to the transfer,

[57] City of Lexington v. Butler, 14 Wall. 293; Moran v. Commissioners of Miami Co., 2 Black, 722; Mercer Co. v. Hacket, 1 Wall. 83; James v. Chalmers, 6 N. Y. 209; Beach v. Wise, 1 Hill, 612; Bedell v. Carll, 33 N. Y. 581.

[58] Fenn v. Harrison, 3 Term R. 759; Fydell v. Clark, 1 Esp. 447; Emly v. Lye, 15 East, 7; Bank of England v. Newman, 1 Ld. Raym. 442. In this case it was held that: "If a man has a bill payable to him or bearer, and delivers it over for money received, without indorsement of it, this is a plain sale of the bill, and he who sells it does not become a new security; but, if he had indorsed it, he had become a new security, and then he had been liable upon the indorsement." Holt, C. J.

[59] Bigelow v. Colton, 13 Gray, 309.

[60] Miller v. Race, 1 Burrows, 452; Mauran v. Lamb, 7 Cow. 174; Grant v. Vaughan, 3 Burrows, 1516. See, also, Daniel, Neg. Inst. § 814, and cases quoted; also section 4, c. 37, § 1191 et seq.

[61] In the case of Leavitt v. Putnam it was held that, if originally negotiable, a bill or note does not lose such character by being dishonored, but may

many of the privileges of a bona fide holder who receives the paper after maturity are destroyed.[62] Defenses of payment, of fraud, of illegality and failure of consideration,[63] in favor of the original parties, may be successfully interposed in an action on a bill or note brought by the transferee of overdue paper when they would have availed against his transferror. As Professor Ames points out, a negotiable instrument overdue becomes a mere chose in action or ordinary contract.

There are some things to be noted concerning overdue paper viewed as a chose in action. Prominent among these is the fact that it

still pass from hand to hand ad infinitum until paid by the drawer. The indorser, after maturity, writes in the same form, and is bound only upon the same conditions of demand upon the drawer and notice of nonpayment, as any other indorser. Thus, the paper retains the main attributes of a proper bill or note. Hurlbut, J., in Leavitt v. Putnam, 3 Comst. (N. Y.) 494. In Deuters v. Townsend it was held that a bill was assignable after maturity, and even after an action had been begun upon the same. 5 Best & S. 613. In Ames v. Meriam it was decided that the rule controlling bills or promissory notes, with respect to equities attaching, does not apply to checks on a bank, taken within a short time after their date. Although payable on demand, they are not treated as being dishonored or overdue on the day, or immediately after the day, of their date. In this case it was held that a note dated January 2d and delivered to a person on January 12th was not an overdue note and subject to defenses between original parties. 98 Mass. 294; Bassenhorst v. Wilby, 45 Ohio St. 333, 13 N. E. 75; Id., Johns. Cas. Bills & N. 45; Carpenter v. Greenop, 74 Mich. 664, 42 N. W. 276.

[62] McCaffrey v. Dustin, 43 Ill. App. 34, Johns. Cas. Bills & N. 144.

[63] See collated cases, footnote to 1 Ames, Bills & N. p. 743. In Brown v. Davies it was held that an overdue note taken with notes for nonpayment on it was subject to the defense of payment by the maker, on the ground that its being so noted for nonpayment when the plaintiff received it should have put him on inquiry. 3 Term R. 80. It was held in Crossley v. Horn that the plaintiff, by taking a note after dishonor, took subject to infirmities and defenses between previous parties. 13 East, 498. In Burrough v. Moss it was decided that the indorser of overdue bills or notes is liable only to equities attaching on the paper itself, and not to claims such as may arise from collateral matters. 10 Barn. & C. 558. In Ashurst v. Royal Bank of Australia it was held that where a note was indorsed by one who was bankrupt at the time, and when overdue, the indorsee takes no better title than that of his transferror. 27 Law T. 168; Howard v. Ames, 3 Metc. (Mass.) 308; Bond v. Fitzpatrick, 4 Gray (Mass.) 89; Fish v. French, 15 Gray (Mass.) 520.

is transferred by indorsement, and not by assignment.[64] The reason for this is that the parties to the original contract contemplated a payment to order. An indorsement signifies that order, and transfers the instrument. In Colt v. Barnard [65] Chief Justice Shaw explains that each indorsement ratifies the original contract on the face of the instrument, and is in the nature of a new draft by which the holder orders the maker to pay the contents to the indorsee, not, indeed, when the instrument by its terms became due, but within a reasonable time. Other authorities deem it similar to an inland bill of exchange drawn by the indorser on the acceptor of the bill or the maker of the note, payable to the indorsee at sight or on demand. And, by analogy, the duty of the indorsee of such an instrument, if he would hold the indorser, is generally determined.[66] An indorser is liable as such if the holder performs his duty in demanding the payment in a reasonable time. By this is meant such a time as would, from the particular circumstances of each case, be allowed in the general conduct of affairs by business men.

The indorsee of a negotiable bill or note after maturity takes the same, and only the same, interest that his indorser had.[67] This is

[64] 2 Ames, Bills & N. p. 853.

[65] Colt v. Barnard, 18 Pick. 260. In this case a note was indorsed by the defendant, who was the payee, to plaintiff, after maturity. There was no evidence of demand of payment on the maker, or of notice to the defendant. The maker was insolvent when the indorsement was made, and had gone to New York, in which state a judgment had been obtained against him, which was unsatisfied. It was held that a note so indorsed after maturity is similar to a bill payable at sight, and to charge indorser there must be presentment to maker, and notice to indorser.

[66] Byles, Bills, p. 169, note; Patterson v. Todd, 18 Pa. St. 426.

[67] In Pine v. Smith, it was decided that one who takes a promissory note indorsed on the last day of grace does so subject to all defenses available in the hands of the payee, and in a suit against the maker the defendant may prove any illegality in the origin of the note. 18 Gray (Mass.) 82. A mortgage given to secure a note for the payment of four installments was taken when one installment was due and not yet paid. It was held that, in a suit to foreclose, the defendant might prove duress as a defense to the whole note. The fact that one installment was overdue should have put plaintiff on inquiry. Vinton v. King, 4 Allen (Mass.) 562. In an action by the indorsee against the maker of a note for $55, it was held that the defendant might show, under a plea of nonassumpsit, that he had given the payee $50

because it is a mere chose in action. He buys the right of action which the indorser had to sell. He buys not only the right of its enforcement, but also the defenses which the original parties may have to it.[68] To give expression to common business phrase, he buys a lawsuit for whatever it is worth, with the chances of its success or failure, as events may turn. The reason, as will be shown under the subject of "Notice," is that, when an indorsee takes an instrument overdue, it is presumed he was acquainted with, or had notice of, the circumstances which would affect the validity of it as against original parties[69] had it been in the hands of the person who was the holder at that time.[70] He cannot be treated as a purchaser without notice, because the fact that the instrument has not been paid when the acceptor or maker promised it should be paid implies that there is some reason on their part for its nonpayment. And whether he has inquired for this reason or not is immaterial. He should have made such inquiry, and the law will hold him to have made it. He is charged with notice of all facts and defenses he would have found out had he made the inquiry.[71]

But there is a limitation to this rule. It is that, if defenses are not available against the assignor or indorser of the overdue paper, then the assignee or indorsee is protected against them. If the

shortly after the assignment, which the latter had agreed to credit on the note. The note in this case was payable on demand, and was negotiable two and a half months after date. Losee v. Dunkin, 7 Johns. (N. Y.) 70. See, also, the case of Holmes v. Kidd, 3 Hurl. & N. 891. As to negotiability of a note payable on demand after the lapse of time, see Brooks v. Mitchell, 9 Mees. & W. 15. As to burden of proof in case of transfer after maturity, see Eames v. Crosier, 101 Cal. 260, 35 Pac. 873; Tyler v. Young, 30 Pa. St. 144.

[68] Folsom v. Bartlett, 2 Cal. 163; Wheeler v. Barret, 20 Mo. 573; Morgan v. U. S., 113 U. S. 500, 5 Sup. Ct. 588; Harrell v. Broxton, 78 Ga. 129, 3 S. E. 5; Money v. Ricketts, 62 Miss. 209; Speck v. Pullman Car Co., 121 Ill. 57, 12 N. E. 213; Church v. Clapp, 47 Mich. 257, 10 N. W. 362; Wood v. McKean, 64 Iowa, 18, 9 N. W. 817; Marsh v. Marshall, 53 Pa. St. 396; Hays v. Kingston (Pa.) 16 Atl. 745.

[69] Hayword v. Stearns, 39 Cal. 58; Nay v. Lamb, 15 Iowa, 79; Etheridge v. Gallagher, 55 Miss. 458.

[70] Williams v. Matthews, 3 Cow. 252.

[71] Fisher v. Leland, 4 Cush. (Mass.) 456; Hinckley v. Union Pac. R. Co., 129 Mass. 61; Marsh v. Marshall, 53 Pa. St. 396; Greenwell v. Haydon, 78 Ky. 333; Kellogg v. Schaake, 56 Mo. 137; Simpson v. Hall, 47 Conn. 417.

right of action is perfect in the assignor or indorser, the assignee or indorsee buys that right of action, and all of it.[72] It is immaterial that indorsers and transferrors, prior to the indorser after maturity, had notice, and were not in the position of the bona fide holder. If the indorser after maturity was a bona fide holder for value, the instrument was good in his hands, and was free from these defenses. A part of his title to the instrument was his power of transferring to others with the same immunity. At the first bona fide negotiation, all defenses between original parties and parties having notice cease to be valid.[73]

In some jurisdictions, the fact that paper is accommodation paper, without other reason, constitutes a defense when that paper is transferred when overdue. This is, however, in contravention of the law as laid down in many decisions, and the reason of these decisions is that the courts will not construe a contract to be implied in accommodation paper not to negotiate it after it becomes due. There must be express words to that effect at the time of the giving of the accommodation. This is because it is deemed the public policy that nothing outside the bill should affect an indorsee for value. The loan of credit given by the accommodation party was indef-

[72] In an action by the indorsee of the drawer against the acceptor, it was no defense that the drawer, by acceptor's authority, had laid bets for the latter, which were lost, and had been paid by drawer, and that the bill had been drawn and accepted for the amount paid by the drawer. Money had been given on acceptor's account which he acknowledges to have been paid, which constitutes a sufficient consideration. This is not, therefore an attempt to enforce a gambling contract. Oulds v. Harrison, 10 Exch. 572. It was held in Bank of Ft. Edward v. Washington County Bank that a certificate of deposit was not dishonored until it was presented. The transferee of such certificate would take free from equities. 5 Hun (N. Y.) 605.

[73] Haskell v. Whitmore, 19 Me. 102; Chalmers v. Lanion, 1 Camp. 383. In this action by indorsees of a bill of exchange against the acceptor, one of the grounds of defense was that the bill had been accepted for a debt contracted in a smuggling transaction, and though indorsed for value, before maturity, to a bona fide holder, yet that it had been indorsed by him to the present plaintiffs after maturity. It was held, however, that if the bill was received from one who might maintain an action upon it, the fact that indorsement was after maturity would not let in such defense. Smith v. Hiscock, 14 Me. 449; Solomons v. Bank of England, 13 East, 135, note; Miller v. Talcott, 54 N. Y. 114; Britton v. Hall, 1 Hilt. 528.

inite in regard to the extent of the time of its operation.[74] There is a criticism to be made upon this doctrine. It came up before the courts on questions of pleading, and it certainly seems not too much to say that the courts appear to have decided the matter without giving it a very thorough consideration. In Sturtevant v. Ford the judges held themselves bound by the principle of stare decisis, though they criticised the rule; and it is submitted with deference to the weight of authority on the point that the English doctrine, as it is followed in several states of the Union, is not the wiser view.

A reasonable presumption of the intention of the parties, where they had said nothing, would seem to be that the purpose of accommodation making, accepting, or indorsing is only to lend credit to the accommodated party for the term of the instrument. In the case of an indorsement, it is to guaranty that the instrument shall be paid at maturity. If the instrument be not paid at maturity, then the contract for payment is broken, and the bill or note becomes a mere chose in action, which may be transferred as a cause of action, but not as a bill or note. If the cause of action was valid in the hands of the holder, then it may be enforced. But, if defense of want of consideration could be raised against such transfer, then it could not be enforced. If the accommodated party against whom the defense of want of consideration can be raised indorses the paper when overdue, the bona fide holder cannot recover.[75] This in no way varies the rule that, if the title to the accommodation

[74] Charles v. Marsden, 1 Taunt. 224. In this case it was held that, in an action by an indorsee for value against an acceptor, it was no defense that the bill was accepted for the accommodation of the maker, and that the plaintiff knew this when he took the bill after maturity. The decision in Stein v. Yglesias also sustains the rule that a bill which has been accepted when overdue is good in the hands of one to whom it was transferred when overdue. This will not be true, however, when the bill was accepted before maturity, and transferred afterwards, if there was an express or implied agreement between acceptor and the one accommodated that such bill should not be negotiated after maturity. 3 Dowl. 252. To the same effect, see Sturtevant v. Ford, 4 Man. & G. 101; Brown v. Mott, 7 Johns, 361; Grant v. Ellicott, 7 Wend. 227; Dunn v. Weston, 71 Me. 270; Davis v. Miller, 14 Grat. 1; Daniel, Neg. Inst. § 786.

[75] Chester v. Dorr, 41 N. Y. 279; Bower v. Hastings, 36 Pa. St. 285; Hoffman v. Foster, 43 Pa. St. 137; Battle v. Weems, 44 Ala. 105.

paper when it becomes due is in some person against whom the defense of want of consideration will not avail, then, on his transfer of it as a chose in action when the paper is overdue, his assignee takes the title which he himself had. An accommodation party cannot raise the defense of want of consideration against a transferee of overdue paper who procures it from a bona fide holder who, in his turn, procured the paper before it became due.[76]

[76] Eckhert v. Ellis, 26 Hun, 663.

CHAPTER VII.

DEFENSES COMMONLY INTERPOSED AGAINST A PURCHASER FOR VALUE WITHOUT NOTICE.

93. Real and Personal Defenses.
94–108. Real Defenses.
109–121. Personal Defenses.

REAL AND PERSONAL DEFENSES.

93. The defenses interposed by a party to a bill or note in a suit brought by a holder against him are commonly of two classes:

(a) REAL—Or those which grow out of some defect, inherent in the instrument itself.

(b) PERSONAL—Or those which grow out of acts which between privy parties would invalidate the transfer or prevent the enforcement of the instrument, but which do not attach to or invalidate the instrument itself.

The next two chapters develop, as far as can here be developed, the position in contract law of the purchaser for value without notice. He stands alone, in that the law will enforce his rights against certain defenses, which would avail against him were they interposed in any other kind of contract than a negotiable instrument. It is not sought to give a statement of all the defenses involved in cases of commercial paper. It is neither desirable nor possible to give an adequate statement of all the defenses which are interposed against even a bona fide holder. It is sought to classify only the common defenses, and to state the main rules concerning them, and the reasons for these rules.[1]

In general, this classification shows that a bona fide holder can recover when the defense interposed is a personal defense, but cannot

[1] The classification of Professor Ames has been adopted. 2 Ames, Bills & N. p. 868.

recover when the defense is real. In the case of immediate parties, all defenses are available, because each independent contract is governed by the general laws of contract. In the case of remote parties, where the holder enforcing the instrument is a purchaser for value without notice, a personal defense cannot be successfully interposed, and only the real defenses are allowed by the courts.

With real defenses the instrument, as a legal obligation, has never existed, or has ceased to exist. They are called "real defenses" because they attach to the res or thing, irrespective of the conduct or agreement of the parties to it. It cannot be enforced by the holder because there is no instrument to enforce. Personal defenses, in contrast to this, are founded upon the act, conduct, or agreement of the parties with reference to the instrument. The instrument with them has a legal inception, and, as an instrument, is a binding obligation. But, as between immediate parties, the courts will not grant a remedy, because the plaintiff in the action—the party seeking its enforcement in the suit—has violated some right, or failed in some duty, so that he has no standing in court. Hence, while the instrument is in form a binding instrument, the person enforcing it has no rights which a court of justice will recognize. The reason for the failure in its enforcement is therefore not real, but personal. But remote parties stand upon another footing so far as personal defenses are concerned. The elements which distinguish them in legal theory from immediate parties are consideration and notice. In this the principle of the law merchant is the ancient principle of equity that where, in the transfer of title, a person has acquired a title and paid a valuable consideration without any notice of an equity actually existing in favor of another, the former may by that means obtain a perfect title, and holds the property freed from the prior outstanding equity.[2] "One who purchases a legal title," says Professor Ames,[3] "for value and without notice, takes the title discharged of all equities to which it was subject in the hands of his vendor. For an equity, being in its nature a claim in personam, and not in rem, can be enforced only against a party to the transaction in which the equity arises, or some

[2] Pom. Eq. Jur. § 591; Le Neve v. Le Neve, 2 Amb. 436, 2 Lead. Cas. Eq. (4th Am. Ed.) 109.

[3] 2 Ames, Bills & N. p. 836.

one in privity with that party. The transfer of bills and notes by virtue of their negotiability is governed by the same principle. A purchaser for value without notice, therefore, acquires a title free from the personal defenses."

SAME—REAL DEFENSES.

94. Common real defenses are—

(a) The incapacity of the defendant to make the instrument.

(b) Those for which statutes declare the instrument void.

(c) Those where the instrument is altered in a material respect.

(d) Perhaps lunacy or drunkenness.

The incapacity of the defendant is usually due to infancy, coverture, ultra vires, or lack of understanding. Of these, ultra vires is a personal defense.

INFANCY.—A negotiable instrument or its indorsement made by an infant is voidable, not void.

It was the opinion of Lord Mansfield [4] and of the bench of which Chancellor Kent was chief judge [5] that a negotiable instrument given by an infant was void, even though it was given for necessaries. The reason upon which these great jurists and the judges who followed them [6] based their opinion was that, if the instrument be valid as a negotiable one in the first instance, the consideration could not be inquired into when it came into the hands of a bona fide holder, and the infant would thereby be precluded from questioning the consideration. Thus, the instrument could not be voidable and remain negotiable. It must be either void or good.

[4] Burgess v. Merrill, 4 Taunt. 468; Williamson v. Watts, 1 Camp. 552 In this case, Lord Mansfield said: "This action certainly cannot be maintained. The defendant is allowed to be an infant; and did any one ever hear of an infant being liable as acceptor of a bill of exchange? The replication is nonsense, and ought to have been demurred to."

[5] Swasey v. Vanderheyden, 10 Johns. 33.

[6] M'Crillis v. How, 3 N. H. 348; McMinn v. Richmonds, 6 Yerg. 9; Morton v. Steward, 5 Ill. App. 533.

This doctrine is certainly not now the law in its entirety. It is settled that between immediate parties, the infant being one, the instrument is voidable, and not void.[7] This means that the infant may ratify or repudiate it, as he sees fit. But in case of remote parties the question is a more complicated one. The rule undoubtedly is, that a bill or note, to be negotiable, must be payable absolutely and at all events. And one argument is that, since an infant's bill or note is voidable and contingent upon his ratification of it, it cannot be negotiable. Yet it is admitted that if the infant, on his majority, choose to ratify the instrument to an indorsee, there is no reason why he should not be bound.[8] The reasons of the text writers thus confronted with conflicting principles are not clear. On the one hand, there can be no doubt that the position of the purchaser for value, without notice, is inferior in grade of right to that of an infant. The purchaser cannot maintain that the contract, although voidable, nevertheless is still valid on reaching his hands, because not disaffirmed, and that, therefore, his equity is superior to that of the infant. In all of the cases where this doctrine has been applied to voidable contracts transferred to a bona fide transferee, its fundamental reason is laches, and laches is not allowed to prejudice an infant's rights. In analogous cases, too, the decisions of courts are against the purchaser for value without notice. For example, the equity of such a purchaser in cases of personal property [9] or of real property [10] does not prevail against the right of the infant to rescind the contract. And a similar doctrine is probably applied to the purchaser for value of a negotiable instrument.[11] And thus the facts stand that the instrument cannot be negotiable, and yet it may vest by indorsement a perfect title in the transferee,

[7] Goodsell v. Myers, 3 Wend. 480; Everson v. Carpenter, 17 Wend. 419; Martin v. Mayo, 10 Mass. 137; Whitney v. Dutch, 14 Mass. 457; Reed v. Batchelder, 1 Metc. (Mass.) 559; Taft v. Sergeant, 18 Barb. 320; Hodges v. Hunt, 22 Barb. 150.

[8] Hunt v. Massey, 5 Barn. & Adol. 902; Lawson v. Lovejoy, 8 Greenl. 405; Edgerly v. Shaw, 5 Fost. (N. H.) 514.

[9] Hill v. Anderson, 5 Smedes & M. 216.

[10] Mustard v. Wohlford's Heirs, 15 Grat. 329; Harrod v. Myers, 21 Ark. 592; Jenkins v. Jenkins, 12 Iowa, 195; Miles v. Lingerman, 24 Ind. 385; Sims v. Smith, 86 Ind. 577; Buchanan v. Hubbard, 96 Ind. 1.

[11] Howard v. Simpkins, 70 Ga. 322.

provided the infant ratify it on coming of age; otherwise if he disaffirm it, and return the consideration. This rule does not include a bill or note given for necessaries, which is probably binding in every one's hands,[12] or cases when the infant himself does not raise in his own behalf the point of non-age; [13] and, of course, it does not apply where the infant ratifies the instrument on coming of age.

The infant, as an indorser, is no more liable than as maker or acceptor. His indorsement in such case is also voidable, and not void. This means not only that the infant is not liable upon the implied contract of indemnity unless he chooses to be; but, according to Judge Story,[14] it means also that the infant may intercept the payment to the indorsee by disaffirming the contract, and returning the consideration, and recover the money called for in the instrument of the maker or acceptor. If the disaffirmance is made before payment to an indorsee, it is a defense against the indorsee. If made after payment, and the infant is payee, the acceptor or maker must pay the money twice, because they have warranted the capacity of the infant. If parties prior to the infant receive notice of the infant's disaffirmance, they are discharged as to the parties subsequent to the infant, because these persons have lost their title to the paper by the avoidance of the indorsement, and they must look to their intermediate warranties to protect themselves. But, except as against himself, the indorsement is effectual as to all parties; and neither the maker, acceptor, nor any other party can refuse to pay the instrument on the ground that an intermediate indorser is an infant.[15]

95. COVERTURE.—At common law a negotiable instrument or an indorsement made by a married woman was not voidable, but void. This rule has been modified by statutes in most jurisdictions.

[12] Earle v. Reed, 10 Metc. (Mass.) 387; Dubose v. Wheddon, 4 McCord (S. C.) 221; Haine's Adm'rs v. Tarrant, 2 Hill (S. C.) 400. See, contra, Trueman v. Hurst, 1 Term R. 40; Williamson v. Watts, 1 Camp. 552.

[13] Hastings v. Dollarhide, 24 Cal. 195; Nightingale v. Withington, 15 Mass. 272.

[14] Story, Prom. Notes, § 80.

[15] Story, Prom. Notes, §§ 80–85; Tied. Com. Paper, § 49; Daniel, Neg. Inst. § 228.

The above is an enunciation of the rule of the common law, now almost obsolete. The reason for the rule wherever it exists is that, according to the former doctrine of the marriage relation, the wife merged her personality in that of her husband, and had therefore no capacity to contract apart from him. If a bill or note was made payable or indorsed to her before marriage, it became her husband's property on marriage; and if after marriage, then, by virtue of the operation of the law, it became her husband's. So a married woman could not indorse, not only because she had no capacity to do so, but also because the instrument was not hers to indorse, but was the property of her husband.[16] But the legal relations of married women at the present day are changing. The statutes of the various states are constantly enlarging their property rights, and it will, without doubt, soon be the law in most of the states of the Union that married women may contract in all respects as if single, and that coverture will be no defense to suits upon negotiable instruments.

96. CORPORATIONS.—The bill or note of a corporation and its indorsement thereon is unenforceable, except as against a bona fide holder, unless made, given, or indorsed for the purposes of its incorporation.

97. An indorsement of a corporation transfers title; but, except when made for the purposes of its incorporation and as against a bona fide holder, it subjects the corporation to no liability as an indorser.

[16] Thus, in Connor v. Martin, 1 Strange, 516, where the plaintiff declared upon a promissory note made to a feme covert, and indorsed by her to him, judgment was given for the defendant, the right being in point of law vested in the husband, and the wife having no power to dispose of it. In Barlow v. Bishop, 1 East, 432, it was held that though a note were given to a married woman, knowing her to be such, with intent that she should indorse it to the plaintiff in payment of a debt which she owed him (in the course of carrying on a trade in her own name by the consent of her husband), yet the property in the note vested in the husband by the delivery to the wife, and no interest passed by her indorsement to the plaintiff. Where a bill of exchange was payable to a feme sole, who intermarried before the same was due, it was held that the husband might sue in his own name without joining the wife, although the latter had not indorsed the bill. McNeilage v. Holloway, 1 Barn. & Ald. 218.

A corporation is defined as an artificial being created by law, composed of individuals united into one body under a collective name, with the capacity of perpetual succession, and of acting as a natural person within the scope of its charter. It is one of the business methods by which men enlarge the effectiveness of property. For in business property or capital is the motive power; men's brains and hands the great machinery for earning money. And by the business contrivances of agencies, partnerships and corporations, a man's capital may be busy earning money in ways of which the owner knows nothing. The agent and partner is a man's other business self in the enterprise in which the agency or partnership is involved. But a corporation is of a somewhat different character. Frequently a large number of persons having money whose investment they cannot personally supervise, aggregate their separate capitals in one enterprise, some furnishing more, some less, the capital being evidenced by what is called "stock," the owners being called the "stockholders." This aggregate capital is invested in given business enterprises, and employed in ways expressly formulated by legislatures. For the purpose of carrying out these legislative designs, officers are chosen by the stockholders from among their own number, called "trustees" or "directors," and from these in turn, generally, the administrative function is created, consisting of an executive called a "president" or a "secretary" or "managing agent," or some similar name, to supervise and direct the investment of the capital furnished by the stockholders, and execute generally the business of the corporation. The business of the corporation is not, however, carried on in the name of its administrative or executive officers, directors, or stockholders. The aggregate capital is created into a distinct legal being and becomes like an ordinary person in all its legal dealings. It takes a name of its own. It acts through the instrumentality of its executive officers, as though it had a mind of its own. And people buy from and sell to it, and contract with it, as though it were itself an acting sentient person.

The law which creates this artificial person makes it the authorized agent of the investing capitalist to do certain things only. These general purposes are found in its charter, which is the legislative act creating it, and is the commission of the corporation to do business. And it is fair to suppose that the only intention

of the capitalist in investing his money in stock is that his money is to be devoted to carrying out the purposes of the incorporation, and nothing else, and that he intended by such investment only to get what proportionate profit his money earned, and incur a proportionate share of the total loss suffered in the enterprise. But for anything outside of this, he did not intend to be bound. Naturally, therefore, when any act is not within the scope of its charter, or the purposes of its incorporation, the power of agency of the corporation ceases. In law phrase the act is "ultra vires." And because the individual stockholders, for whose collective body the corporation is but another name, and whose agent the corporation is, cannot be presumed to have intended to incur any liability not contemplated by its charter, and not necessary to carry on its business. Such an act is void. Hence the meaning of the rules that a corporation has power to make such contracts as are either expressly or impliedly authorized by its charter or act of incorporation, or are necessary or not foreign to the carrying on of its business,[17] but that it has no capacity to perform acts beyond these express or implied powers. Therefore an executory contract ultra vires is void. It can be enforced neither by nor against the corporation.[18]

The power of a corporation to make contracts necessary to carry on its business, implies that it may borrow money, make debts and issue negotiable paper for the purposes of its business.[19] So that

[17] Thomas v. Railroad Co., 101 U. S. 82; Perrine v. Canal Co., 9 How. 184; Bank v. Godfrey, 23 Ill. 579; Western Cottage Organ Co. v. Reddish, 51 Iowa, 55, 49 N. W. 1048; Richardson v. Massachusetts Charitable Mechanic Ass'n, 131 Mass. 174; Weckler v. First Nat. Bank, 42 Md. 581; Booth v. Robinson, 55 Md. 419; Wayland University v. Boorman, 56 Wis. 657, 14 N. W. 819; State v. Rice, 65 Ala. 83; Cleveland & M. R. Co. v. Himrod Furnace Co., 37 Ohio St. 321; Curtis v. Leavitt, 15 N. Y. 64; Spear v. Crawford, 14 Wend. 22; Page v. Heineberg, 40 Vt. 81; Rivanna Nav. Co. v. Dawsons, 3 Grat. 19; Thompson v. Waters, 25 Mich. 222; Moss v. Averell, 10 N. Y. 449; Aull Sav. Bank v. City of Lexington, 74 Mo. 104.

[18] Hitchcock v. Galveston, 96 U. S. 341; Bank of Michigan v. Niles, 1 Doug. 401; Nassau Bank v. Jones, 95 N. Y. 115.

[19] Mining Co. v. Anglo-Californian Bank, 104 U. S. 192; Moss v. Harpeth Academy, 7 Heisk. 285; Rockwell v. Elkhorn Bank, 13 Wis. 653; Smith v. Eureka Flour Mills, 6 Cal. 1; Munn v. Commission Co., 15 Johns. 44; Curtis v. Leavitt, 15 N. Y. 173; Booth v. Robinson, 55 Md. 419; Goodrich v. Reynolds, 31 Ill. 490.

the rule is that wherever a corporation may contract a debt, it may draw a bill or give a note in payment of it.[20] It may also borrow money to pay the debt, and in furtherance of this may execute a bill or note to secure the borrowed money.[21] Also, it has power to take a bill or note for a debt due to it. And what it may receive, it may transfer.[22] And this means that instruments may be indorsed in full or in blank by corporations, including also the power to enter into the collateral contract which an indorser assumes.[23]

The converse of these propositions is not what might be expected. The limit of the rule apparently is that a bill or note ultra vires is unenforceable only as between immediate parties; but a bill or any other negotiable security which is not upon its face illegal and unauthorized, is valid in the hands of a purchaser for value without notice, except in those cases in which the security is made void by statute. The reason for this is, that one who deals directly with a corporation, or who takes its negotiable paper, is presumed to know the extent of its corporate power. But when the paper is upon its face in all respects such as the corporation has authority to issue, and its only defect consists in some extrinsic fact, such as the purpose or object for which it was issued, and a bona fide holder for value receives it, he may enforce it against the corporation. He is not bound to inquire into such extrinsic fact. He is in no way apprised of it from the paper itself. And the burden should not be cast upon him of suffering loss under such

[20] 1 Pars. Notes & B. 164, 165.

[21] Mott v. Hicks, 1 Cow. 513; Safford v. Wyckoff, 4 Hill, 442; Moss v. Oakley, 2 Hill, 265; Mead v. Keeler, 24 Barb. 20; Partridge v. Badger, 25 Barb. 146; Hamilton v. Newcastle & D. R. R., 9 Ind. 359; Came v. Brigham, 39 Me. 35; Clarke v. School Dist., 8 R. I. 199; Buckley v. Briggs, 30 Mo. 452.

[22] Lucas v. Pitney, 27 N. J. Law, 221; McIntire v. Preston, 10 Ill. 48; Hardy v. Merriweather, 14 Ind. 203.

[23] Bank of Genesee v. Patchin Bank, 13 N. Y. 309. The following is a portion of the opinion of Denio, J., in this case: "I entertain no doubt but that a bank may lawfully indorse the commercial paper which it holds, with a view to raise money upon it by way of discount, or for any other lawful purpose. In this respect it has the same right as any other holder of such paper. * * * The contract of indorsement is incident to the negotiation of mercantile paper, and the right to transfer such paper includes the power to enter into the collateral contract which an indorser assumes." Marvine v. Hymers, 12 N. Y. 223; Planters' Bank v. Sharp, 6 How. 301.

circumstances, and it is not.[24] This rule applies both to the making or accepting a note or bill and to their indorsement.[25] And of course its necessary implication is, that if the ultra vires is known to the purchaser, the instrument or the indorsement is unenforceable against the corporation.

The general scope of this work does not admit of the discussion of interesting questions concerning commercial paper of public corporations, the execution of bills and notes by the agents of corporations, and lastly the character of acts within the power of corporations. For these the students must refer to more extensive treatises.

It remains under this head to speak of the effect of indorsements ultra vires upon the transfer of title. The rule is that an indorsement ultra vires is a good transfer of the instrument, although it is ultra vires, and therefore not binding except as above stated upon the corporate indorser.[26] The reason is that to be an indorser, the corporation must be either the payee or an indorsee of the instrument. And being such payee or indorsee, the parties liable on the paper are estopped from pleading ultra vires, because they have made the paper payable to, or else have indorsed it to, the corporation, and have received its funds. The defense of ultra vires is for the protection of the stockholders of a corporation, and not for the benefit of the other parties to the paper.[27] It is like the defense of illegality of incorporation, which is not meant as an excuse for the nonpayment of indebtedness, but as a protection

[24] Genesee Bank v. Patchin Bank, 13 N. Y. 309; Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 125.

[25] Mechanics' Banking Ass'n v. New York & S. W. L. Co., 35 N. Y. 505. See, also, for general doctrine, Bank of New York v. Muskingum Branch Bank of Ohio, 29 N. Y. 619; Barker v. Mechanics' Fire Ins. Co., 3 Wend. 94; Olcott v. Tioga R. Co., 27 N. Y. 546; Supervisors v. Schenck, 5 Wall. 772; Bird v. Daggett, 97 Mass. 494; Monument Nat. Bank v. Globe Works, 101 Mass. 57; Mitchell v. Rome R. Co., 17 Ga. 574; Hall v. Auburn Turnpike Co., 27 Cal. 255.

[26] Smith v. Johnson, 3 Hurl. & N. 222; Brown v. Donnell, 49 Me. 421.

[27] Farmers' & Merchants' Ins. Co. v. Needles, 52 Mo. 17; Snyder v. Studebaker, 19 Ind. 462; Griener v. Ulerey, 20 Iowa, 266; Massey v. Paola Bldg. & Sav. Ass'n, 22 Kan. 634.

to those whose money is invested in the stock of the enterprise.[28] Thus, the transfer, though ultra vires, transfers title, because prior parties are estopped from taking advantage of the defense.

98. PERSONS NON COMPOS MENTIS.—Total lack of understanding in persons non compos mentis or drunken is a defense to the enforcement of a bill or note, both as between immediate parties and as against a bona fide holder, when the party sought to be charged was an adjudged incompetent. It is doubtful whether in itself it is such a defense to an instrument sought to be enforced by a holder if the holder was one in good faith for value, and without notice. It is in itself a defense as between the immediate parties, unless, perhaps, the contract was fair and the other party had no knowledge of the lunatic's incompetency.

The views of courts are changing with reference to bills or notes, upon which persons non compos mentis have incurred an obligation. They are departing from a position which was sustained by consistent theory, but at the expense of justice and common sense. This theory was that such executory contracts would not be enforced by courts, because persons non compos mentis had no assenting mind, and therefore no capacity to contract,[29] and also because the courts would protect such persons from the results of

[28] Veeder v. Mudgett, 95 N. Y. 295; Eaton v. Aspinwall, 19 N. Y. 119; Wright v. Pipe Line Co., 101 Pa. St. 204; Union Nat. Bank v. Hunt, 7 Mo. App. 42; In re Kings Co. El. R. Co., 105 N. Y. 97, 13 N. E. 18.

[29] Sentance v. Poole, 3 Car. & P. 1. In this case Lord Tenterden, C. J., delivered the following charge: "The question in this case is whether the defendant John Poole, at the time he put his name to this note, which is drawn in an unusual form, it being 'to your order,' and not addressed to any one, was or was not conscious of what he was doing, for, if he was, there must be a verdict for the plaintiff; but should you be satisfied that he was not conscious of what he was doing, and that he was imposed upon by reason of his imbecility of mind, you ought to find for the defendant." Seaver v. Phelps, 11 Pick. 304; Daniels, Neg. Inst. 210; Edw. Neg. Inst. § 24; In re Desilver's Estate, 5 Rawle, 111; Van Deusen v. Sweet, 51 N. Y. 378; Dexter v. Hall, 15 Wall. 9.

their own incapacity, whether designedly injured or even not injured at all. And while probably the majority of the decisions and very many of the text writers do in truth declare this to be the rule,[80] it is generally felt, whenever it is applied, that it is, as a working rule, impracticable. The consensus of opinion in regard to executed contracts, at least, is that the contract of a lunatic is only voidable at his option, if it can be shown that at the time of making the contract it was unfair, that the parties can be restored to their former condition, and that the lunatic was absolutely incapable of understanding what he was doing, and the other party knew of his condition.[81] But with executory contracts, and among them negotiable instruments, the law has not gone so far. There is still great weight of authority holding that a lunatic's contract is voidable, at his option, whether fair or unfair, or whether the other party is ignorant of or acquainted with his mental condition;[82] and it must be said that any other doctrine than this is not yet established. But more advanced views, based on business needs and the practical administration of law, are changing or perhaps developing this rule into rules which may be formulated as follows:

(1) After inquisition duly found, the courts will refuse to enforce the bill or note of an adjudged lunatic, or an indorsement by him against him directly, even in favor of a bona fide holder, but will direct his committee to pay the amount thereof, if it is a just claim. This rule applies to the bills, notes and indorsements of adjudged habitual drunkards.

(2) If no inquisition has been found, but the incompetency is known to the other party, then as between the parties the note is void.

(3) If no inquisition has been found, and if the incompetency is unknown to the other party, and the transaction is fair, and the

[80] Moore v. Hershey, 90 Pa. St. 196; Van Patten v. Beals, 46 Iowa, 63.

[81] Molton v. Camroux, 4 Exch. 17; Elliot v. Ince, 7 De Gex, M. & G. 478; Brown v. Jodrell, 3 Car. & P. 30; Beals v. See, 10 Pa. St. 56; Behrens v. McKenzie, 23 Iowa, 333; Shoulters v. Allen, 51 Mich. 530, 16 N. W. 888; Matthiessen v. McMahon, 38 N. J. Law, 536.

[82] Sentance v. Poole, 3 Car. & P. 1; Seaver v. Phelps, 11 Pick. 304; Hovey v. Hobson, 53 Me. 451; Rogers v. Blackwell, 49 Mich. 192, 13 N. W. 512; Van Patten v. Beals, 46 Iowa, 63; Daniel, Neg. Inst. § 210; Tied. Com. Paper, 53.

parties cannot be restored to statu quo, a recovery may be had upon the bill, note or indorsement against the incompetent.

An inquisition in lunacy is a judgment of the law which gives over the person and estate of the lunatic to the custody of court, and takes from him all competency to contract until his rights are restored by the court itself. By virtue of it, contracts of lunatics made after inquisition found, create no binding legal tie, because it rests with the court in whose hands their property is to allow or disallow their enforcement.[33] The redress for claimants in obtaining payment of claims, is to present them to the officer of the court commissioned to conduct the affairs of the lunatic, who is usually called the "committee," of his person and estate. This committee upon their presentment investigates the transaction, and ascertains its justice. If the committee refuses payment, the claimant must then go into court, and ask permission to prosecute his claim by suit. If the court is satisfied of the justice of the debt, it will order it paid out of the funds in the hands of its committee; if doubtful, it will appoint a referee or master in chancery to ascertain its justice, or else direct it to be tested by a suit to be brought.[34] The law to protect its own machinery declares that an inquisition found is like a proceeding in rem, conclusive on all the world, and all are bound to take notice of it. Actual notice is not necessary, and, whether given or not, is immaterial. The inquisition is conclusive against subsequent acts and dealings, and presumptive against prior ones. And this is the rule irrespective of notice.[35] It must be noted that in England the inquisition is only presumptive evidence of lunacy,[36] and that in some states it is conclusive only as to parties, and others may rebut it by clear evidence.[37] It is not meant to say, however,

[33] Fitzhugh v. Wilcox, 12 Barb. 236; Crippen v. Culver, 13 Barb. 424; Clarke v. Dunham, 4 Denio, 262; In re McLaughlin, Clarke, Ch. 113.

[34] Williams v. Cameron, 26 Barb. 172; In re Hopper, 5 Paige, 489, 491; L'Amoureaux v. Crosby, 2 Paige, 428; In re Wing, 2 Hun, 671.

[35] Hughes v. Jones, 116 N. Y. 67, 22 N. E. 446; Banker v. Banker, 63 N. Y. 409; Van Deusen v. Sweet, 51 N. Y. 378; Ripley v. Grant, 4 Ired. Eq. (N. C.) 443; McGinnis v. Com., 74 Pa. St. 245; Lancaster Co. Bank v. Moore, 78 Pa. St. 407.

[36] Sergeson v. Sealey, 2 Atk. 412; Faulder v. Silk, 3 Camp. 126.

[37] Den v. Clark, 10 N. J. Law, 217; Rogers v. Walker, 6 Pa. St. 371; Moore v. Hershey, 90 Pa. St. 196; Carter v. Beckwith, 128 N. Y. 312, 28 N. E. 582;

that the lunatic by inquisition is relieved from debts or liabilities incurred either before or after the inquisition. All that is meant is that he can no longer buy or sell or enter into any contract or dealing binding him or his estate. The court administers his estate for the protection of creditors, and will apply it to the payment of his debts and the satisfaction of all obligations and charges which legally ought to be satisfied out of his property.

This rule and the reasons for it apply to the bills, notes and indorsements of those adjudged to be habitual drunkards. If a person is adjudged incompetent to manage his own affairs by reason of drunkenness, such person is not liable upon his bill, note or indorsement even when that is in the hands of a bona fide holder. The holder and purchaser is bound to take notice of the public judicial act of taking a man's property out of his hands, and putting it into that of a committee. The creditor must have his recourse against the committee, and not against the drunkard. And if the remedy is thus taken, and the court is satisfied upon the whole that the claim is just, it will allow it to be paid.[38]

If no inquisition has been found, the validity of the bill, note or indorsement depends, first, upon the degree of understanding possessed by the party sought to be charged. A man of weak mind, if not a lunatic or a fool, can contract.[39] An epileptic or enfeebled mind has been held competent to convey property.[40] A person born deaf and dumb is not necessarily an idiot.[41] And no mere want of business capacity,[42] nor even monomania,[43] will, in the absence of fraud, prevent a party from being bound upon a bill, note, or indorsement. The mental incompetency to avoid such a contract

People v. Tax Com'rs, 100 N. Y. 215, 3 N. E. 85; Southern Masonic Relief Tier Ass'n v. Laudenbach (Sup.) 5 N. Y. Supp. 901.

[38] Wadsworth v. Sharpsteen, 8 N. Y. 388; L'Amoureaux v. Crosby, 2 Paige, 427.

[39] Odell v. Buck, 21 Wend. 142.

[40] Sprague v. Duel, Clarke, Ch. 90, affirmed 11 Paige, 480.

[41] Brower v. Fisher, 4 Johns. Ch. 441.

[42] Farnum v. Brooks, 9 Pick. 212; Osmond v. Fitzroy, 3 P. Wms. 129; Stewart v. Lispenard, 26 Wend. 255; Lawrence v. Willis, 75 N. C. 471; Lewis v. Pead, 1 Ves. Jr. 19.

[43] Burgess v. Pollock, 53 Iowa, 273, 5 N. W. 179; West v. Russell, 48 Mich. 74, 11 N. W. 812; Boyce v. Smith, 9 Grat. 704.

must amount to inability to understand the nature of the contract, and to appreciate its probable consequences;[44] and this only, upon being established, will be allowed as a defense. But, once established, the question of the binding liability of this contract depends upon the fact whether the party dealing with him knew or did not know that he was dealing with a lunatic. In the absence of anything being shown upon the subject, the courts lean to the presumption that the party had this knowledge.[45] And if he possessed such knowledge, then the bill, note or indorsement as between the parties is void, and will not be enforced.[46] But if he did not possess such knowledge, then the position of the parties has not as yet been fully developed and settled by the courts; but so far as it has, it depends, in the first place, upon whether the contract is fair. The courts have not defined what is meant by this, and its meaning naturally would be determined largely by the circumstances of each case. But in the absence of any expression on the subject, it is reasonable to suppose that a fair contract would mean such as business men of ordinary prudence would make, taking into consideration the circumstances of each case, and that the presence or absence of any intent to defraud, overreach or cheat would be an important element in determining the point. The next consideration in the relations of the parties, is whether upon repudiation of the contract by the lunatic the other party can be restored to statu quo. This is because the right of cancellation, being an equitable one, must be governed by equity precedents, and among equity precedents one of the most important is that "he who seeks equity must do equity." The lunatic cannot keep the benefits of a contract, and at the same time rescind it. And these two considerations lead up to the rule, which is without doubt the most practical yet determined upon, that bills, notes or indorsements entered

[44] Titcomb v. Vantyle, 84 Ill. 371; Wall v. Hill, 1 B. Mon. 290; Hovey v. Chase, 52 Me. 305; Davren v. White, 42 N. J. Eq. 569, 7 Atl. 682; Young v. Stevens, 48 N. H. 133; Farnam v. Brooks, 9 Pick. 212; Jackson v. King, 4 Cow. 207.

[45] Riggs v. American Tract Soc., 84 N. Y. 330, reargued 95 N. Y. 503.

[46] Westerfield v. Jackson, 3 N. Y. St. Rep. 354; Rice v. Peet, 15 Johns. 503; Johnson v. Stone, 35 Hun, 380; Hannahs v. Sheldon, 20 Mich. 278; McClain v. Davis, 77 Ind. 419; Lincoln v. Buckmaster, 32 Vt. 652; Burke v. Allen, 29 N. H. 106.

into by an insane person are valid where the other party acted in good faith, without fraud or unfairness, and without knowledge of the insanity or notice or information calling for inquiry.[47] Whether the other party has the full rights of a bona fide holder or not, and whether all presumptions are in his favor or not, is not clear. Declarations of courts within recent years imply that the presumptions are not in his favor, and that, lunacy being shown, the burden is upon the holder to show ignorance, fairness and irreparable loss.[48] But it is to be suspected that the courts in making these decisions were influenced more by the ancient doctrines than the modern tendencies of law. These modern tendencies, followed to their logical conclusion, would seem to require that it be shown affirmatively against the holder that in his dealing with the negotiable instrument he had violated some of the equities we have mentioned. And that the defendant should be called upon not only to show the lunacy, but also the plaintiff's knowledge or suspicion of it, as well as the unfairness of the transaction. Such, however, at present, does not seem to be the rule.

The courts have arrived at rules regulating contracts of intoxicated persons by very similar steps. These rules depend upon the question whether the drunkard was adjudged incompetent to manage his affairs or not, and, if not, then the question arose in what stage of drunkenness the contract was made. They have classified the rules in cases where no committee has been appointed as follows:

(1) When a maker, acceptor or indorser is so intoxicated that he is entirely bereft of his senses, the weight of authority is that no recovery against him can be had by the bona fide holder; and, if no recovery can be had, then he may recover upon the original consideration.

(2) That when a maker, acceptor or indorser is slightly under the influence of liquor, a recovery can be had. Such a state can be used only to show fraud.

[47] Mutual Life Ins. Co. v. Hunt, 79 N. Y. 541; Browne v. Joddrell, 1 Moody & M. 105; In re Beckwith, 3 Hun, 443; Hirsch v. Trainer, 3 Abb. N. C. 274, and note; Dane v. Kirkwall, 8 Car. & P. 679; Molton v. Camroux, 2 Exch. 487, affirmed 4 Exch. 17; Elliot v. Ince, 7 De Gex, M. & G. 475; Young v. Stevens, 48 N. H. 133; Beals v. See, 10 Pa. St. 56; Behrens v. McKenzie, 23 Iowa, 343.

[48] Hicks v. Marshall, 8 Hun, 327; Goodell v. Harrington, 3 Thomp. & C. 345.

In cases of bills and notes made in a state of complete intoxication by persons not adjudged habitual drunkards, there is a difference of opinion in different jurisdictions. The majority of decisions of the courts and also the majority of the text writers declare that total drunkenness is a perfect defense to a drunkard's bill or note or the indorsement thereon. And these authorities imply that it is such even when prosecuted by a purchaser for value without notice, because, as they say, it is voidable.[49] But there are other opinions of courts which consider such a bill or note perfectly good in his hands.[50] The English courts are governed in their rulings by the somewhat artificial differences growing out of their former system of pleading. In those courts it is held, with regard to contracts which it is sought to avoid on the ground of intoxication, that there is a distinction between "express" and "implied" contracts. When a right of action is grounded upon an express contract, requiring the assent of both parties, and one of them is incapable of assenting, there can be no binding contract. But in many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances, and itself makes the contract for the parties. A tradesman, for example, who supplies a drunken man with necessaries may recover the price of them, if the party keeps them when he becomes sober.[51] And so with negotiable instruments, the defendant is still liable for the consideration of the instrument or of the indorsement, though he is not upon the instrument itself. Upon the other side of the question, it is urged in behalf of the bona fide holder that the equities are in favor of the bona fide holder. Drunkenness ought not to be regarded, because it is the man's own fault.[52] It is not to be placed on the footing of insanity, because it is temporary. The law protects, and ought to protect, the helpless infant and the God-stricken insane, but should

[49] Gore v. Gibson, 13 Mees. & W. 623; Wigglesworth v. Steers, 1 Hen. & M. 70; Jenners v. Howard, 6 Blackf. 240; Hawkins v. Bone, 4 Fost. & F. 311; Byles, Bills, 64; Tied. Com. Paper, § 57; Daniel, Neg. Inst. § 214. But see Wilson v. Nisbet, Mor. Dict. 1509.

[50] Johnson v. Medlicott, 3 P. Wms. 130, note; State Bank v. McCoy, 69 Pa. St. 204; Neeley v. McSparran, 91 Pa. St. 17.

[51] Pollock, C. B., in Gore v. Gibson, 13 Mees. & W. 623.

[52] Wilson v. Nisbet, 2 Mor. Dict. 1509.

not the vicious or foolish drunkard. And of two aggrieved parties —the drunkard and the bona fide holder—it would seem clearly that the equities of the latter should prevail.[53] When the intoxicated person is not bereft of his senses, there can be no doubt about the position. If the party were only in that state of pleasant exhilaration common in such cases, and was clear in his mind upon what he was doing, then intoxication is no defense. It may only be used as a means of showing fraud, for intoxication may have been used as a means of imposing upon the party to the instrument. But here the fraud, and not the intoxication, is the basis of defense.[54] The party had capacity to incur an obligation, and the courts will enforce the obligation he has incurred. That his senses were clouded would be no excuse. The court could no more take that into consideration than it could that one party was sharper than another in making a bargain.[55]

99. STATUTES.—Statutes which avoid instruments are of the following varieties:

(a) Those which in words declare the contract void.

(b) Those which annex a penalty to the consideration or performance of the act for which the bill, note, or indorsement is given.

This section is properly but a part of the latter one of this chapter upon "Illegality of Consideration." And both of these sections are but extracts of the positions taken upon the subject of the legality of the object of contracts in the elementary works upon that subject. The scope of this work does not admit of a thorough discussion of the statutes which render the consideration of bills, notes and indorsements illegal. To pursue that subject with any thoroughness, the student must examine works on the general subject of contracts.

[53] Berkley v. Cannon, 4 Rich. Law, 136; Northam v. Latouche, 4 Car. & P. 145. And see Smith v. Williamson, Johns. Cas. Bills & N. 193.

[54] Say v. Barwick, 1 Ves. & B. 195; Willcox v. Jackson, 51 Iowa, 208, 1 N. W. 513.

[55] Miller v. Finley, 26 Mich. 249; Caulkins v. Fry, 35 Conn. 170; Reinicker v. Smith, 2 Har. & J. 421; Reynolds v. Dechaums, 24 Tex. 174.

It is our purpose only to state the leading principles concerning the application of statutes avoiding contracts to bills and notes, and then to discuss somewhat more at length the statutory doctrine of usury, which of all the statutes avoiding negotiable instruments, is most often before the courts.

Statutes may avoid a bill or note in two ways. The first is where in words it declares them to be void.[56] Such a declaration means that it was the object of the legislature entirely to prevent the circulation of a bill or note as commercial paper. And this object the courts will enforce despite any equities that a bona fide purchaser may have. The reason for this is that the public good, evidenced by this intention to prevent circulation, overrides any private right.[57] The student must note carefully that this reasoning does not apply when the statute merely declares the consideration of a bill or note to be illegal. An illegal consideration is one which may be in itself valid. Yet courts will not enforce it, because the legislature has declared in its statute that the people deem it against the public welfare to allow it to be enforced. Therefore, in view of the legislative act, it is an invalid consideration, or, in other words, no consideration at all. Hence, against a bill or note in the hands of a bona fide holder, mere illegality of consideration can no more be urged than lack of consideration can.[58] For, in declaring a consideration illegal merely, the legislature will not be presumed to intend to prevent

[56] An instance of this is found in the case of Bowyer v. Bampton, 2 Strange, 1155, where it was held that the innocent indorsee of a gaming note can maintain no action against the drawer. He may, however, sue the indorser upon his indorsement. This case was decided in accordance with St. 9 Anne, c. 14, § 1, which says "that all notes, where the whole or any part of the consideration is money knowingly lent for gaming, shall be void to all intents and purposes whatever." For other cases in which bills or notes are void by virtue of a statute, see Bennison v. Jewison, 12 Jur. 485 (where a bill could not be shown in evidence through want of a stamp); Easter v. Minard, 26 Ill. 494; Taylor v. Atchison, 54 Ill. 196; Bayley v. Taber, 5 Mass. 286; Wiggin v. Bush, 12 Johns. (N. Y.) 306; First Nat. Bank v. Grindstaff, 45 Ind. 158.

[57] Bayley v. Taber, 5 Mass. 286; City of Aurora v. West, 22 Ind. 88; Cazet v. Field, 9 Gray, 329; Towne v. Rice, 122 Mass. 67; Glenn v. Farmers' Bank, 70 N. C. 191; Bowyer v. Bampton, 2 Strange, 1155.

[58] Rockwell v. Charles, 2 Hill (N. Y.) 499; Hill v. Northrup, 4 Thomp. & C. 120; Grimes v. Hillenbrand, 4 Hun, 354.

the circulation of the bill or note, but merely to forbid its enforcement between immediate parties.[59]

The second general class of statutes which avoid bills and notes are those which inflict penalties. It is thought by the courts that the intention of the legislature in affixing penalties is to suppress a mode of dealing which it regards as injurious to society by attainting the contract, and attaching penal consequences to it whenever set up as a proof of debt.[60] Such at least is the early doctrine, and it would seem to be the view of the courts at present that a penalized consideration renders the bill or note void, and not merely illegal. And because it is void, and because its circulation is against the public welfare, no bona fide holder can enforce it. But this rule also has its limitation. A penalty is only a prohibition when the object of the statute is to protect the public. And if it is clear that this is not the object of the penalty, but that it is enforced for administrative purposes, then this rule does not apply.[61] And with these very general remarks upon statutes avoiding negotiable instruments, let us turn to the statute of usury.

100. USURY.—The statute which commonly creates a real defense is the statute of usury. Usury is taking or receiving, with corrupt intent, money, goods, or things in action at a rate of interest upon the loan or forbearance of money, in a greater amount than is allowed by statutory law.

101. The holder of a bill or note, even if he be a purchaser for value without notice, cannot recover the amount of the instrument from persons who were parties to the instrument at its inception, when the instrument was negotiated in its inception at a rate greater than the legal rate of interest.

[59] Vallett v. Parker, 6 Wend. 615.

[60] Shaw, C. J., in Kendall v. Robertson, 12 Cush. 156; Griffith v. Wells, 3 Denio, 226; Woods v. Armstrong, 54 Ala. 150.

[61] Anson, Cont. p. 172; Pol. Cont. pp. 253–254; Clark, Cont. p. 387, and cases.

102. Where a holder acquires a bill or note by an indorsement at a rate greater than the legal rate of interest, such indorsement is a sale by the indorser and a purchase by the indorsee, for which the indorsee may recover the full amount of the maker, acceptor, or other prior parties, and the amount paid for the bill of his prior indorser.

Usury is of that class of evils called in law "malum prohibitum." By this is meant something that is in itself not intrinsically wrong, but something which the people, through their legislatures, have declared inexpedient as a business practice, and therefore not to be allowed. It is a wrong which is created by statute, and in derogation of common law. And the first thing to be noticed is, that the statutes which create it are strictly construed and their operation is confined in every possible way. To constitute usury three elements are necessary: (1) More than the lawful rate of interest must have been received or reserved. (2) It must be the effect of a corrupt agreement. (3) The subject of the contract must be a loan. And in discussing the subject in the brief space permitted here, it is purposed in the first place to outline very generally the nature of usury, and then to consider the commonest instances in which it arises in cases of bills and notes.

Intent.

Usury is the effect of a corrupt agreement. There must exist the intention knowingly to commit usury.[62] This intent of the parties, when the contract is not upon its face usurious, is to be gathered from such circumstances as the situation and object of the parties at the time of the loan, the character and use to be made of the funds or article transferred, and the time and manner and place of payment. Designedly taking and receiving interest greater than the legal rate, although there be no corrupt agreement other than that which is manifested by one party allowing and the other re-

[62] Price v. Campbell, 2 Call (Va.) 110; Condit v. Baldwin, 21 N. Y. 219; Nourse v. Prime, 7 Johns, Ch. 77; Bank of U. S. v. Waggener, 9 Pet. 399; Tyson v. Rickard, 3 Har. & J. 109; Bearce v. Barstow, 9 Mass. 45; Scott v. Lloyd, 9 Pet. 418; Duncan v. Maryland Sav. Inst., 10 Gill. & J. 299.

ceiving interest, is sufficient evidence of intent. In fact, this is generally the way in which the corrupt agreement is shown.

Loan or Forbearance of Money.

It is a well-settled rule that the loan must be of money,[63] unless otherwise expressly provided by statute. An agreement, for example, whereby the parties loaned cattle, upon the understanding that during the loan the lessee was to pay a stipulated sum for the use of the property, with the further stipulation that the lease might terminate in sale, but, if the sale was not carried out, the cattle were to be returned, was held not a usurious one. The case turned upon the principle that, where the agreement was for the loan of chattels, it was immaterial whether the compensation fixed by the agreement exceeded the statutory rate, because the subject of the loan, since it was not money, was not within the statute of usury. An agreement where sheep were loaned, and, by the contract, the same number were to be returned, of the same age and quality, with interest of 15 to 25 per cent. upon their cash value,[64] and another agreement where a heifer was loaned at an interest of 25 per cent., to be returned in kind,[65] were considered not usurious. These differ from money, in that money is supposed to have a fixed value. Chattels vary according as the market rises or falls. Therefore a loan of animals to be returned in animals is not usury, usury being confined to money only. The courts construe this out of the term usually employed in the statutes, "the rate of interest." They take the ground that interest and forbearance cannot be predicated of any other than a loan of money, actual or presumed, because money has the same value when the loan is made and when returned; whereas chattels, measured by the standard of money, so fluctuate that taking the chattels borrowed and returned with the compensation for the use of the same at the time of returning the borrowed property, may or may not aggregate in money value the value of the

[63] Dry Dock Bank v. American Life Insurance & Trust Co., 3 N. Y. 344; Bull v. Rice, 5 N. Y. 315; Perrine v. Hotchkiss, 2 Lans. 416; Dunham v. Dey, 13 Johns. 40; Suydam v. Westfall, 4 Hill, 211; Ketcham v. Barber, Id. 225; Tardeveau v. Smith's Ex'rs, Hardin (Ky.) 185; Foote v. Emerson, 10 Vt. 338; Spencer v. Tilden, 5 Cow. 144.

[64] Hall v. Haggart, 17 Wend. 280.

[65] Cummings v. Williams, 4 Wend. 680.

property loaned in the first instance. In the case of negotiable instruments, where an accommodation party makes, accepts, or indorses an instrument, and receives a commission for so doing, deducted from the avails of the note itself, there is no usury.[66] The statute forbids an illegal rate of interest upon the loan or forbearance of money. This is a loan of credit, and not of money, credit being a distinct property from money. So lenders may, in addition to lawful interest on the discount of bills and notes, take a reasonable commission by way of compensation for trouble and expense, provided such commission be not intended as a device to cover a usurious loan.[67] In all of these things, the moneys paid or deducted were for some other reason than the mere loan of money itself. Something was done in addition to handing over the money, and that something was paid for. Such payment was not interest, but rent or compensation.[68]

Discounting—Compound Interest.

Another thing to mention is the common practice by which a note is discounted in advance upon its face value.[69] The lender here has the use of his own discount, and this, in case of discount of paper in large amounts, aggregates sometimes very large sums of money. This is, in fact, usurious, but, time out of mind, it has been the custom, and is allowed for the benefit of trade. It is confined in its

[66] Van Duzer v. Howe, 21 N. Y. 531; Kitchel v. Schenck, 29 N. Y. 515.

[67] Thurston v. Cornell, 38 N. Y. 281; Morton v. Thurber, 85 N. Y. 551; Eaton v. Alger, 2 Abb. Dec. 5; Trotter v. Curtis, 14 Johns. 160; Dayton v. Moore, 30 N. J. Eq. 543; Atlanta Mining & Rolling Mill Co. v. Gwyer, 48 Ga. 11; Cockle v. Flack, 93 U. S. 344; De Forest v. Strong, 8 Conn. 513. In Kent v. Walton, 7 Wend. (N. Y.) 256, it was held by Savage, C. J., that, "to make out the defense of usury, it was necessary to shew that the note was not a valid instrument when discounted. * * * It is well settled that discounting a business note at more than seven per cent. interest is not usury." "The principle is too well settled to be questioned that a bill free from usury in its concoction may be sold at a discount; because, as it was free from usury between the original parties to it, no subsequent transaction can, as it respects those parties, invalidate it." Sutherland, J., in Cram v. Hendricks, Id. 569, 572. And see Wiffen v. Roberts, 1 Esp. 261. But see Clofiin v. Boorum, Johns. Cas. Bills & N. 168.

[68] Ketchum v. Barber, 4 Hill (N. Y.) 225.

[69] Marvine v. Hymers, 12 N. Y. 223.

operation to negotiable instruments, because of their importance in commercial affairs, and because it is the established custom of banks, which play so important a part in discounting them that on all hands it is deemed necessary for the circulation of the instrument in the course of trade. Again, compound interest is not usury.[70] There is this distinction, however: An agreement for compounding future interest is illegal, not because such agreements are obnoxious to the usury laws, but because they may serve as a temptation to negligence on the part of the creditor and a snare to the debtor, and prove in the end oppressive and ruinous.[71] But where the interest has already accrued, then the parties may lawfully agree to turn such interest into principal, and to carry the interest, and the forbearance will constitute a consideration. As a matter of fact, there is no new loan, and the interest is in excess of the legal rate. But the law implies a loan, and, an agreement being made, it declares the contract free from the taint of usury.

Effect of Usury.

But, usury being once present, the next question is, how far does the statute operate in avoidance of contracts where it in words declares the contract void or penalizes the transaction. The general rule in such cases is that, as between immediate parties in respect to all persons seeking enforcement of the contract, it is void. Usury being a purely statutory defense, the statutes must be examined in each instance to know just the extent of its effect. The taint of usury in the original contract is carried forward and enters into all subsequent contracts taken in renewal of it. And if it appears that a contract in the first instance is void, and is sought to be renewed by changing its form, so that the contract still stands upon the original loan, then the loan given in renewal is also void.[72] This general rule is also very much confined, the exceptions being probably more numerous than the application of the

[70] Stewart v. Petree, 55 N. Y. 621; Guernsey v. Rexford, 63 N. Y. 631; Culver v. Bigelow, Johns. Cas. Bills & N. 171; Miner v. Paris Exch. Bank, 53 Tex. 559; Hamilton v. Le Grange, 2 H. Bl. 144; Fobes v. Cantfield, 3 Ohio, 17.

[71] Quackenbush v. Leonard, 9 Paige, 334; Young v. Hill, 67 N. Y. 162.

[72] Campbell v. Sloan, 62 St. 481; Pickett v. Merchants' Nat. Bank, 32 Ark. 346.

rule itself. A mortgage, for instance, may be void for usury, but a bona fide purchaser of the property under its foreclosure acquires good title.[73] A party is estopped from setting up usury where, by his representations, he has persuaded an innocent party to discount a negotiable instrument. Contracts voidable for usury may be ratified and become valid contracts.[74] And also, where a renewal note is void for usury, the parties may sue upon the original consideration.[75] And, lastly, usury is a defense which can only be availed of by parties to the contract, or those connected in interest with them. A mere stranger, or one who has no legal interest in the question, may not take advantage of the statute, because the intent of the statute was to relieve oppressed debtors. They alone may claim its protection, and declare the contract, usurious in its inception, void.[76]

Same—As Applied to Bills and Notes.

It only remains to apply the theories of usury where they avoid the instrument, to the doctrines of bills and notes. The more common situations to which the rules of usury have been applied are these: (1) Where an instrument is usurious in its inception;[77] (2) where a contract is valid in its inception, but usury is alleged in a subsequent indorsement or transfer of it; (3) where one indorser seeks to avail himself of it as a defense where either the note had a usurious inception, or prior indorsements have been corrupted by usury.

The inception of the instrument, so far as it relates to usury, is not its delivery. In such cases the question is whether the person discounting the instrument, and taking greater than the legal rate

[73] Jackson v. Henry, 10 Johns. 195; Elliott v. Wood, 53 Barb. 285.

[74] Dix v. Van Wyck, 2 Hill (N. Y.) 522, and cases cited.

[75] Farmers' & Mechanics' Bank v. Joslyn, 37 N. Y. 353; Winsted Bank v. Webb, 39 N. Y. 325, 476, and note; Knights v. Putnam, 3 Pick. 184; Oates v. First Nat. Bank, 100 U. S. 239. See, also, Ohio & M. R. Co. v. Kasson, 37 N. Y. 218; De Wolf v. Johnson, 10 Wheat. 367; Ward v. Sugg, 113 N. C. 489, 8 S. E. 717, and Johns. Cas. Bills & N. 163.

[76] Mason v. Lord, 40 N. Y. 490.

[77] In Townsend v. Bush, 1 Conn. 260, one who was a party to the instrument in question, but who was divested of his interest therein, was held competent as a witness to prove the paper to have been usurious in its inception.

of interest, takes it from a person who at the time of such discount could have maintained an action upon it against prior parties to the instrument itself. For, if the person who received the money upon the discount of the instrument could not have maintained an action against prior parties, then these prior parties must be deemed accommodation parties, and the instrument has its legal inception in its discount with the party who deducts greater than the legal rate of interest.[78]

When the paper is usurious in its inception, then it is void as to the maker, acceptor, and parties prior to the discount, and no subsequent transaction can make it valid.[79] Void in its inception, it continues void forever, whatever its subsequent history may be. It is as void as to these parties in the hands of an innocent holder for value as it was in the hands of those who made the usurious contract. No vitality can be given it by sale or exchange, because

[78] Sweet v. Chapman, 7 Hun, 576. It was held by Noxon, J., in this case that "the rule appears to be settled that a promissory note, to be the subject of sale, must be an existing valid note in the hands of the payee, and given for some actual consideration, so that it can be enforced against the original parties, and, if not valid in the hands of the payee, cannot be rendered valid by a sale to a bona fide purchaser at a rate of interest exceeding seven per cent." Hall v. Wilson, 16 Barb. 548; Hall v. Earnest, 36 Barb. 588; Rapelye v. Anderson, 4 Hill (N. Y.) 483; Bossange v. Ross, 29 Barb. 576; Belden v. Lamb, 17 Conn. 452; Holeman v. Hobson, 8 Humph. 129; Corcoran v. Powers, 6 Ohio St. 19; Bock v. Lauman, 24 Pa. St. 448; Van Schaack v. Stafford, 12 Pick. 565.

[79] In the case of Lowe v. Waller, 2 Doug. 736, it was decided that the transaction was for the loan of money, and not a sale of goods; and, as the sum to be paid exceeded the value of the goods and five per cent. interest, it was held to be a case of usury; and it was further held that a bill of exchange upon a usurious consideration is void, even in the hands of an indorsee, for valuable consideration, without notice of the usury. Where the payee of a bill of exchange indorses it upon a usurious contract at the time of the contract, a bona fide holder cannot afterwards recover upon it against the acceptor. Lowes v. Mazzaredo, 1 Starkie, 385. As to the rule when there is no usury in the inception of the bill, see Parr v. Eliason, 1 East, 92, and Cardwell v. Martin, 9 East. 191. Where a negotiable instrument is free from usury in its inception, it may not be afterwards tainted with usury, save as between the immediate parties thereto. Knights v. Putnam, 3 Pick. (Mass.) 184.

that which the statute has declared void cannot be made valid by passing through the channels of trade.[80]

Where the instrument is not usurious in its inception, but is valid as between the drawer, acceptor or maker and the payee, so that the latter can maintain an action upon it against the former, then the bill or note may be sold by the payee or subsequent indorsee to the purchaser for less than the face value, less the legal rate of interest for the time the paper has to run. This is because, if the paper was free from usury in the beginning, no after-transaction with another person can, as respects the original parties, invalidate it. So that the face of the paper may be recovered by the indorsee from remote and prior parties to valid paper, untainted with usury in its inception.[81] As to immediate parties between whom less than the face of the bill has been paid, the relation is somewhat different. The instrument is treated like any chattel, the discount being the purchase price. If the prior immediate party is sued, then he may show just what he received for the note which he sold.[82] But all other parties may not avail themselves of this reduction, because they, by virtue of their indorsement, indemnify for the face of the instrument itself. They stand in the relation of indorsers, whereas the immediate party, who has received less than the face of the bill, stands in

[80] Claflin v. Boorum, 122 N. Y. 385, 25 N. E. 360; Powell v. Waters, 8 Cow. 669; Wilkie v. Roosevelt, 3 Johns. Cas. 206; Bennett v. Smith, 15 Johns. 335–357; Miller v. Hull, 4 Denio, 104, 107; Miller v. Zeimer, 111 N. Y. 441–444, 18 N. E. 716; Lowe v. Waller, 2 Doug. 736; Lowes v. Mazzaredo, 1 Starkie, 385. In this case it was held that, where the payee of a bill of exchange indorses it upon a usurious contract at the time of the contract, a bona fide holder cannot afterwards recover upon it against the acceptor. Chapman v. Black, 2 Barn. & Ald. 590.

[81] Crane v. Price, 35 N. Y. 494; Corning v. Pond, 29 Hun, 129; Nichols v. Fearson, 7 Pet. 109; Newman v. Williams, 29 Miss. 222; French v. Grindle, 15 Me. 163.

[82] Munn v. Commission Co., 15 Johns. 44; Ingalls v. Lee, 9 Barb. 651; Cram v. Hendricks, 7 Wend. 569; Noble v. Walker, 32 Ala. 456; Coye v. Palmer, 16 Cal. 158; French v. Grindle, 15 Me. 163. But this doctrine has been sharply criticised, and is doubted. Roark v. Turner, 29 Ga. 455; National Bank v. Green, 33 Iowa, 140; Nichols v. Fearson, 7 Pet. 103; Belden v. Lamb, 17 Conn. 441; Turner v. Brown, 3 Smedes & M. 425.

the position of a person selling a chattel.[83] When one indorsee receives the note from an indorser, which is void as against the maker or prior parties for usury, he may recover from his indorser the amount paid upon the indorsement. This is because the indorsement amounted to a new and independent contract between such indorser and indorsee, and the usury, which was a defense to the acceptor or maker, was no defense as to them. In other words, the indorser warranted the bill or note, and was estopped from setting up the defense of usury, so that suit might be maintained upon the theory of implied warranty and recovery might be had for the amount or consideration which he paid his immediate indorser.

While we have endeavored to formulate in a concise way the most logical theories concerning the transfer of negotiable instruments, the student is cautioned that there is great confusion in the adjudged cases in the different states of the Union. This is particularly true in cases involving indorsements affected by usury. As a matter of theory, the position taken by the text writers Daniel and Parsons[84] seems the most logical and most to be commended. It is that an indorsee discounting paper for more than the legal rate allowed may hold all parties liable for its face. The reason for this is that the statutes against usury must be strictly construed. They interdict excessive interest for the loan of money. An indorsement is not a loan of money. The indorser does not cash his own promise to pay money. He cashes such a promise made by some one else with a guaranty or promise of indemnity of his own superadded. It is no more a usurious transaction than it would be for them to sell a piece of land with a warranty on their part that it was what it pretended to be. Such a contract is not a loan, and not within the strict construction of the statute of usury.

[83] Sherman v. Blackman, 24 Ill. 345; Lloyd v. Keach, 2 Conn. 175; Ayer v. Tilden, 15 Gray, 178; Cameron v. Chappell, 24 Wend. 94; Rice v. Mather, 3 Wend. 62.

[84] Daniel, Neg. Inst. § 768; 2 Pars. Notes & B. 429, 430.

103. ALTERATION AND FORGERY.—The defenses interposed where the instrument is altered in a material respect or forged are called "material alteration" or "forgery."

104. ALTERATION—Is changing in any respect the terms of an executed negotiable instrument by a party thereto without the assent of the other parties.

105. A material alteration avoids the instrument, because, as altered, it no longer represents the agreement among the parties.

106. An immaterial alteration is one which does not change the tenor of the instrument. It does not avoid the instrument.

The reason that a material alteration of a negotiable instrument discharges a party who does not consent thereto is that it destroys the identity of the contract, and substitutes an agreement different from that into which the parties entered.[85] It is immaterial whether the intent with which the alteration was made was fraudulent or not.[86] And, though the doctrine of the leading case [87] on the subject shows that the reason which influenced the court of king's bench was that they considered an alteration in itself fraudulent, the present and probably wiser reason is that the party never assented to the liability called for in the altered instrument, and therefore the courts will not enforce it against him. In England this theory is carried in the early cases to extreme limits. They [88]

[85] Wood v. Steele, 6 Wall. 80; Angle v. Insurance Co., 92 U. S. 330; Mersman v. Werges, 5 Sup. Ct. 65, 112 U. S. 139; Greenfield Sav. Bank v. Stowell, 123 Mass. 196.

[86] Booth v. Powers, 56 N. Y. 22; Evans v. Foreman, 60 Mo. 449; Heath v. Blake, 5 S. E. 842, 28 S. C. 406. See, contra, Van Brunt v. Eoff, 35 Barb. 501. In cases of ordinary contract for necessity of fraudulent intent, see Horst v. Wagner, 43 Iowa, 373; Rogers v. Shaw, 59 Cal. 260; Cochran v. Nebeker, 48 Ind. 459; Nickerson v. Swett, 135 Mass. 518; Neff v. Horner, 63 Pa. St. 330.

[87] Master v. Miller, 4 Term R. 320, 2 H. Bl. 140.

[88] Davidson v. Cooper, 11 Mees. & W. 795, 13 Mees. & W. 343; Pattinson v. Luckley, L. R. 10 Exch. 330, 44 Law J. Exch. 180; Pigot's Case, 11 Coke, 27.

maintain that even though the alteration be made by a stranger, and the parties to a contract be innocent of it, nevertheless the contract is void, and will not be enforced. But an examination of these early authorities shows that they originated in and depended upon distinctions and theories of pleading, and there is certainly no reason except that of stare decisis why it should now be the law. In America, an early departure from this doctrine was taken.[89] An alteration by a stranger was regarded as a mere spoliation. The burden of proof to show that the alteration was not made by the party seeking to recover, or by those under whom he claimed, nor with his or their privity or consent, was cast upon the party producing the instrument or seeking to recover upon it. Upon this being shown, the contents of the original instrument, if they could be ascertained, were enforced. The instrument was not declared void.

This is in accord with the fundamental principles of contract. Equally so are those which hold that alterations made with the knowledge or consent of the parties, or which do not change the effect or tenor of the instrument, do not affect the validity, where the parties know and assent to the change, and derive any benefit from it. It is a new contract upon a new consideration, and therefore in itself valid. Where there is no benefit derived from either party by the change, and yet they have knowledge of and assent to the change, each party makes the person making the change his agent, and ratifies his act.[90] Where the legal effect of the instrument is not changed by an alteration, the alteration is immaterial. The liability sought to be enforced against the party is the one which he in the first place assumed. The fact that the verbiage or appearance of the instrument is changed is unimportant. The

[89] Rees v. Overbaugh, 6 Cow. 746; Lewis v. Payn, 8 Cow. 71; Nichols v. Johnson, 10 Conn. 192; Wickes v. Caulk, 5 Har. & J. 36; Den v. Wright, 7 N. J. Law (2 Halst.) 176; Waring v. Smyth, 2 Barb. Ch. 119. See, also, Bridges v. Winters, 42 Miss. 135; Piersol v. Grimes, 30 Ind. 129; Hunt v. Gray, 35 N. J. Law, 227; Lubbering v. Kohlbrecher, 22 Mo. 596; Drum v. Drum, 133 Mass. 568.

[90] National State Bank v. Rising, 4 Hun, 793; Commercial Bank of Buffalo v. Warren, 15 N. Y. 577; Greenfield Bank v. Crafts, 4 Allen, 447; Huntington v. Ballou, 2 Lans. 120; Humphreys v. Guillow, 13 N. H. 385; Bell v. Mahin, 69 Iowa, 408, 29 N. W. 331; Camden Bank v. Hall, 14 N. J. Law, 583; Jackson v. Johnson, 67 Ga. 167; Canon v. Grigsby, 116 Ill. 151, 5 N. E. 362.

courts look to the obligation, and, if that be unaltered in effect, then it is enforced. The courts will not allow justice to be obstructed, for the light reason that the form of the agreement is altered when its substance remains.

107. Alterations are material:

(a) Which lessen or place an additional burden on any of the parties. Such are changes in the date, time, place, amount, or medium of payment and the rate of interest.

(b) Which change the liabilities and obligations of all or any of the parties. Such are the addition or removal of the signature of a maker, drawer, indorser, payee, or co-surety.

(c) Which change the operation of the instrument, or its effect in evidence. Such are adding words of negotiability or of a special consideration after value received, or changing the form of the indorsement, or changing the liability from joint to several, or from joint to joint and several, as the case may be.

The absence of a date upon a negotiable instrument at its inception, or the fact that it is postdated or antedated, may not be material upon the question of its validity. But when a date has once been inserted, and its time of payment has thus been fixed, such date is material, and cannot be altered without consent.[91] The rea-

[91] Stephens v. Graham, 7 Serg. & R. 505; Walton v. Hastings, 4 Camp. 223; Jacobs v. Hart, 2 Starkie, 45; Outhwaite v. Luntley, 4 Camp. 179; Master v. Miller, 4 Term R. 320 (in this case it was held that an alteration of the date of a bill of exchange, after acceptance, whereby the payment would be accelerated, avoids the instrument, and no action can be maintained upon it, even by an innocent holder for valuable consideration); Britton v. Dierker, 46 Mo. 592; Owings v. Arnot, 33 Mo. 406; Crawford v. West Side Bank, 2 N. E. 881, 100 N. Y. 50. In Langton v. Lazarus, 5 Mees. & W. 629, which was an action in assumpsit by the indorsee against the acceptor of a bill of ex-

son for this is, in the words of Justice Swayne,[92] that "the agreement is no longer the one into which the parties entered. Its identity is changed. Another is substituted. There is no longer the necessary concurrence of minds. To prevent and punish such tampering, the law does not permit the holder to fall back upon the contract as it was originally. In pursuance of a stern, but wise, policy, it annuls the instrument as to the party sought to be wronged. The date is obviously a material part of the order or promise. It indicates the time of its inception. It shows the time of its performance. And its alteration places an unjust burden and a liability upon the wronged party which the law will not enforce. For much the same reason, an alteration in a note or bill which changes the time of its payment is material, and discharges those parties to it who did not authorize the change.[93] This is true whether the payment is hastened or delayed. It is no argument that such acceleration or delay may be a benefit to the acceptor, maker, or indorsers, in any particular case; for, if this tampering with instruments were permitted, there would be no certain time for the acceptor or maker to have his funds at a given place, nor for the indorsers to be on the alert to see that the payment was made, and to protect themselves if it were not. A change in the instrument in respect to its time of payment would place the burden of constant inquiry upon the parties liable for its payment. This reasoning also applies where the place of payment is obliterated, or where a place of payment is inserted, or where the place of payment is otherwise altered.

change, it was pleaded as a defense that before the bill came due, and while it was "in full force and effect," the date was altered by the drawer, whereby it became void. The plea was held bad, but only for the reason that it did not allege the alteration to have been made after acceptance.

[92] Wood v. Steele, 6 Wall. 80.

[93] Lee v. Murdoch, 4 Pat. App. 261; Long v. Moore, 3 Esp. 155, note. In the case of Alderson v. Langdale, 3 Barn. & Adol. 660, the vendee of goods paid for them by a bill of exchange drawn by him on a third person; and, after it had been accepted, the vender altered the time of payment mentioned in the bill, and thereby vitiated it. It was held that by so doing he made the bill his own, and caused it to operate as a satisfaction of the original debt, and consequently that he could not recover for the goods sold. Miller v. Gilleland, 19 Pa. St. 119; Lewis v. Kramer, 3 Md. 265; Bathe v. Taylor, 15 East, 412; Benedict v. Miner, 58 Ill. 19; Lisle v. Rogers, 18 B. Mon. 528.

Properly enough, the law does not permit even a bona fide holder to recover upon a bill or note so altered against the parties, prior to the one making the alteration.[94] The place, as well as the time, of payment, are essential and material parts of the contract entered into; for on their proximity or remoteness must depend, in point of time, the indorser's knowledge of nonpayment, which in most cases must be to him a matter of great importance. He cannot be charged with liability unless payment of the instrument is demanded at the time when and the place where it is due; and, when this is changed without the indorser's consent, he is subjected to new and unexpected liabilities, and in fact a new contract is made for him, to which he is not a party.[95]

The amount to be paid by the instrument cannot be changed, either by lessening or increasing it, without destroying the contract. Under this rule there can be no lessening or increasing the amount of principal,[96] nor adding words varying the interest to be paid on

[94] Cowie v. Halsall, 4 Barn. & Ald. 197, 3 Starkie, 36; Rex v. Treble, 2 Taunt. 328; Tidmarsh v. Grover, 1 Maule & S. 735; Nazro v. Fuller, 24 Wend. 374; Sudler v. Collins, 2 Houst. 538; Burchfield v. Moore, 25 Eng. Law & Eq. 123; Morehead v. Parkersburg Nat. Bank, 5 W. Va. 74; Macintosh v. Haydon, Ryan & M. 362; Hill v. Cooley, 46 Pa. St. 259; White v. Haas, 32 Ala. 430; Oakey v. Wilcox, 3 How. (Miss.) 330.

[95] Woodworth v. Bank of America, 19 Johns. 391; Wolcott v. Santvoord, 17 Johns. 248; Nazro v. Fuller, 24 Wend. 374.

[96] Goodman v. Eastman, 4 N. H. 455; Bank of Commerce v. Union Bank, 3 N. Y. 230; Stephens v. Graham, 7 Serg. & R. 505. In the case of Citizens' Nat. Bank v. Richmond, 121 Mass. 110, the facts were as follows: A note was indorsed for the maker's accommodation. Afterwards the maker, by means of chemicals, removed the original amount of the note, and inserted a larger amount, for which he got the note discounted. Before the note was due, the alteration was discovered, and the original writing restored. The note was protested, and action brought against the indorser for the first amount. He was held not to be liable. "The defendant never made the note for $2,000, which was the only one that the plaintiff accepted." (Per Curiam.) See, also, Young v. Grote, 4 Bing. 253. A check drawn by a customer upon his banker for a sum of money described in the body of the check in words and figures was afterwards altered by the holder, who substituted a larger sum for that mentioned in the check, in such a manner that no one in the ordinary course of business could observe it. The banker paid to the holder this larger sum. It was held that he could not charge the customer beyond the sum for which the check was originally drawn. Hall v. Fuller, 5 Barn.

a bill or note, either by changing the per cent. or adding interest where the bill or note did not before provide for any;[97] nor by altering the currency in which payment is to be made, or, if the bill or note is payable in merchandise, modifying the character or quality

& C. 750. In the case of Marine Nat. Bank v. National City Bank, 59 N. Y. 67, it was held that where a check which had been altered as to name of payee, date, and amount had been certified, and afterwards paid by the plaintiff, such amount could be recovered back as money paid through mistake. But in the case of Pagan v. Wylie, Mor. Dict. 1660, a bill which was accepted and indorsed was given to the drawer. By filling up certain blank spaces, he altered the amount of the bill from £8 to £84. It was held by the court that where a blank space is left in a bill, large enough to allow of the insertion of words or parts of words, any one who puts his name upon it as drawer, indorser, or acceptor, and gives it to the hand of another, is liable in the same way as though the sum had been left entirely blank. In Brown v. Reed, 79 Pa. St. 370, the note in question had formed originally part of a contract so drawn that by cutting off a part of it a negotiable note was left. It was held that, where the maker of a negotiable instrument executes it so negligently as to admit of easy alteration, he will be held liable to a bona fide holder who has taken it before maturity in the ordinary course of business.

[97] Boalt v. Brown, 13 Ohio St. 364; Waterman v. Vose, 43 Me. 504; Lee v. Starbird, 55 Me. 491; Neff v. Horner, 63 Pa. St. 327; Dewey v. Reed, 40 Barb. 16; Brown v. Jones, 3 Port. 420; Whitmer v. Frye, 10 Mo. 348; Fay v. Smith, 1 Allen, 477; Patterson v. McNeeley, 16 Ohio St. 348; McGrath v. Clark, 56 N. Y. 34. In this case a promissory note was indorsed by the defendant, but with time and place of payment left blank. Upon its delivery to him, the maker, having filled in the blanks, added the words "with interest." It was held that, by delivery to him, the maker was authorized to fill in the blanks as to time and place, as he wished, but that the addition of the "with interest" was not authorized, and was such a material alteration as would invalidate the note, unless proof of authority beyond the mere fact of delivery be shown. "The addition of the words 'with interest' increased the liability of the indorser; and the maker had no more right to add those words than he had to increase the sum for which the note was given by adding the amount of the interest to it for the time the note had to run." Per Church, C. J. Where a payee or subsequent holder added after the printed words "with interest at," at the end of a promissory note, the following: "10 per cent.,"—without knowledge of the maker, it was held that such alteration would constitute a good defense by the maker against a bona fide purchaser, and would invalidate the note. Holmes v. Trumper, 22 Mich. 427. Ivory v. Michael, 33 Mo. 398; Warrington v. Early, 2 El. & Bl. 763; Sutton v. Toomer, 7 Barn. & C. 416.

of the goods.[98] The reason for these rules is that, if the amount to be paid is increased or lessened,—the identity of the contract is destroyed. If interest is added, it adds to the burden borne by the parties; if diminished, the effect of the contract is changed; and, since there might be cases where injury would be wrought, the policy of the law will not permit such change. The question to be determined is whether the words added or stricken out were mere surplusage, or whether they were material to the obligation assumed by the parties to the contract. The materiality turns upon the evident intent of the parties, and whether the change was in furtherance of that intention. The test is whether the legal damages contemplated by the parties were the same as those to be awarded by the contract in its changed condition.[99]

The doctrine of the so-called "Piggot's Case," [100] which is the source of the doctrine of alteration, has been extended to every situation where instruments are presented or sought to be used as evidence for the enforcement of an unexecuted obligation or contract. If there is added or withdrawn another maker or drawer, or if a person signs or withdraws his name as a surety to a note or bill after it is executed, such addition or withdrawal creates a new contract. Hence such change is a material alteration.[101] In such case, too, it is not to the point that the alteration be or be not to the prejudice of the party against whom the liability is sought to be enforced. The courts will not compel the execution of a contract which the parties have never made. They will not sit in judgment upon the question whether it be to the prejudice of the party aggrieved or not.[102] This is also true where the operation or effect of the instrument is changed, and it operates differently from the original instrument. If, for example, a promissory note, negotiable, and for the

[98] Darwin v. Rippey, 63 N. C. 318; State v. Cilley, quoted in 1 N. H. 97; Martendale v. Follett, 1 N. H. 95; Schwalm v. McIntyre, 17 Wis. 232.

[99] Church v. Howard, 17 Hun, 5.

[100] 11 Coke, 27.

[101] Clark v. Blackstock, Holt, N. P. 474; Ex parte White, 2 Deac. & C. 334; Bank of Limestone v. Penick, 5 T. B. Mon. 25; Pulliam v. Withers, 8 Dana, 98; Gardner v. Walsh, 32 Eng. Law & Eq. 162.

[102] Chappell v. Spencer, 23 Barb. 584; Montgomery v. Crossthwait, 8 South. 498, Johns. Cas. Bills & N. 154, and 90 Ala. 553.

payment of a sum of money absolutely on its face, is modified and loses its negotiability, so that it is converted into a special contract, the alteration is material, and avoids the instrument.[103] Where there are memoranda upon the instrument which qualify it, and are intended as a substantive part of it, and these are changed, the alteration is material.[104] So, also, ingrafting upon a joint note a several obligation, or changing a joint and several to a joint note, destroys the operation of the original contract, and renders it void.

It is perhaps proper to add to the foregoing rules a statement of the way they are limited in their operation. The rule, briefly stated, is that where the party complaining of the alteration has by his negligent conduct made the alteration possible, so that the alteration can be so made either by alteration or erasure as not to excite the suspicion of a careful man, the aggrieved party will be liable upon it to a bona fide holder. This is because a maker, by putting his paper in circulation, has invited the public to receive it if any one has it in possession with apparent title to it. And he is estopped to urge the actual defect of title against a bona fide holder.[105]

108. FORGERY.—Forgery of a negotiable instrument, or the indorsement thereon, except in case of ratification or estoppel, nullifies the instrument as to all parties against whom the forgery is committed.

Forgery means either falsely making, counterfeiting, altering, erasing or obliterating a genuine negotiable instrument, in whole or in

[103] Hartley v. Wilkinson, 4 Maule & S. 25; Cholmeley v. Darley, 14 Mees. & W. 343; Leeds v. Lancashire, 2 Camp. 205.

[104] Benedict v. Cowden, 49 N. Y. 396; Johnson v. Heagan, 23 Me. 329; Burchfield v. Moore, 3 El. & Bl. 683; Simpson v. Stackhouse, 9 Pa. St. (9 Barr.) 186; Wheelock v. Freeman, 13 Pick. 165. In the case of Wait v. Pomeroy, 20 Mich. 425, a memorandum which was written under a note, and by which the obligation was qualified, was shown to have been destroyed, and it was held that by such destruction a note, even though in the hands of a bona fide holder, is vitiated. "If it formed a part of the original contract, it was a material alteration to detach the memorandum, and leave the note as if it had been absolute. And it is a principle well settled that such an alteration avoids the entire instrument." Per Campbell, C. J.

[105] Van Duzer v. Howe, 21 N. Y. 531.

part, or the false making or counterfeiting of the signature of a party thereto, with intend to defraud.[106] Its essential elements are intent to defraud,[107] the forging of the instrument, and its utterance or delivery by the forger.[108] In some of its aspects it is closely akin to alteration, but is distinguished from it in that its essential element is fraudulent intent, while material alterations may be innocently made. If innocently made, though the alteration be material, recovery can be had upon the original consideration, but, if fraudulently made, and the alteration be material, no recovery can be had upon the instrument or upon the consideration.[109] This rule, though harsh, is deemed wise, all things considered, because forgery ought to shut the doors of courts to the forger. It is deemed the wisest policy to punish his fraud by causing him to lose all remedy for the enforcement of his rights. And this consideration does not outweigh in the mind of courts the other one that the debtor gains all there is in the transaction by the fraud of the creditor.

Forgery creates no legal right or obligation against the party whose name is forged, even though the instrument be sought to be enforced by a purchaser for value without notice.[110] The forgery is in no wise the legal act of this party. It is the act of some one else personating him without authority. In case of an indorser there is the further reason that to transfer or to derive a legal title to an instrument it is necessary to prove the handwriting of the

[106] Pen. Code N. Y. § 520.

[107] Daniel, Neg. Inst. § 1349; Edw. Bills & N. § 268; People v. D'Argencour, 82 Hun, 178, affirmed 95 N. Y. 624; Phelps v. People, 72 N. Y. 371.

[108] Daniel, Neg. Inst. § 1350.

[109] Booth v. Powers, 56 N. Y. 22; Meyer v. Huncke, 55 N. Y. 412; Kennedy v. Crandell, 3 Lans. 1; Trow v. Glen Cove Starch Co., 1 Daly, 280; Blade v. Noland, 12 Wend. 173; Clute v. Small, 17 Wend. 238; Atkinson v. Hawdon, 2 Adol. & El. 628 (in this case it was held that if the drawer sues the acceptor upon the bill, and fails in consequence of having altered the bill in a material part, he may still recover upon the counts on the original consideration); Hunt v. Gray, 35 N. J. Law, 227; Vogle v. Ripper, 34 Ill. 100; Matteson v. Ellsworth, 33 Wis. 488. See, contra, Martendale v. Follett, 1 N. H. 99; Bigelow v. Stilphen, 35 Vt. 525.

[110] In the case of Smith v. Sheppard, Chit. Bills (10th Ed.) note, it was said by Lord Mansfield that "he that takes a forged bill must abide by the consequence, for the man whose name is forged knows nothing of it."

payee. Unless this is done, title does not pass.[111] So that, except in case of ratification or estoppel, in no event is a maker, acceptor, drawer, or indorser liable upon an instrument forged as to him. Ratification and estoppel, however, take the case from the operation of the rule. Ratification means the adoption by a party of a forged signature as his own. Estoppel means the refusal to allow a party to deny a forged signature purporting to be his because by his words or conduct he has induced some other party to the instrument to act to his detriment upon the belief that the forged signature is a valid one. Ratification binds the party because, according to the general principles of contract as adopted in this country, a ratification made with full knowledge binds a principal although no antecedent authority was given.[112] For there is no sufficient reason why, upon the fact of forgery alone, a person whose name has been forged may not adopt and affirm the forgery or signature as his own act and thereby subject himself to whatever civil liability may follow it.[113] Estoppel binds the party because his treating the instrument as genuine fixes the right, and he may not overset the right by afterwards disputing it. Thus if the maker of a note or the drawer of a bill issues it to a bona fide holder with forged or fictitious names upon it,[114] or if an indorser transfer an instrument upon which the

[111] Graves v. American Exch. Bank, 17 N. Y. 205; Colson v. Arnot, 57 N. Y. 253; Palm v. Watt, 7 Hun, 317. In the case of Caulkins v. Whisler, 29 Iowa, 495, a person wrote his name on a blank paper, for the purpose of identifying his signature; and the one to whom such paper was given wrote over the name a promissory note, which he negotiated before maturity to an innocent holder. It was held that "a holder of negotiable paper acquired before dishonor is not protected against defenses that make void the instrument. He can have no claim upon forged paper against the person whose name is falsely affixed thereto as the maker, and who is without fault as to the forgery and the taking of the paper by the holder." Mead v. Young, 4 Term R. 28.

[112] Howard v. Duncan, 3 Lans. 174; Union Bank v. Middlebrook, 33 Conn. 95; Thorn v. Bell, Lalor Supp. 430. See, contra, Shisler v. Vandike, 92 Pa. St. 449; Brook v. Hook, L. R. 6 Exch. 89; McKenzie v. British Linen Co., 44 Law T. (N. S.) 431; Workman v. Wright, 33 Ohio St. 495.

[113] The student must carry in mind that this doctrine is by no means settled. There is authority against it, which Mr. Daniels has characterized as based upon views of force. Neg. Inst. §§ 1351, 1352, et seq.

[114] Hortsman v. Henshaw, 11 How. 177 (in this case the bill had upon it

name of the drawer, maker, acceptor, or of a prior indorser is forged, then each of these parties is bound because of estoppel by virtue of the reasons already discussed under the head of "Warranties." [115]

It often happens, however, that the forgery of the instrument is not detected until the cash called for in it is paid to the ostensible holder. In such case diverse rights arise. The party paying may recover the amount paid from the person paid on the ground of payment under a mistake of fact.[116] And this is so despite any laches or negligence which may be charged by the person paid to the person paying.[117] There are two exceptions to this rule. One is when this payment is made through negligence which results in loss.[118] The other is when a drawee pays a bill upon the forged signature of the drawer to a bona fide holder for value, in which case he is held to a knowledge of his correspondent's signature,[119] and therefore unable to recover from the bona fide holder. If the payment of paper negotiable only by indorsement is made by the drawee of a draft in good faith under a forged indorsement, it is, as to the true owner of the draft, no payment at all, because the forged indorsement does not pass title to commercial paper, and the true owner may therefore recover the amount of the draft from the drawee,[120] as though the drawee had not already made payment of it.[121] This rule is extended

the forged indorsements of the payee, and it was put in circulation by the drawers. By so doing, they must be understood as affirming that the indorsement is in the handwriting of the payees, or written by their authority. * * * The drawers must be equally liable to the acceptor who paid the bill." Taney, C. J.); Burgess v. Northern Bank, 4 Bush, 600; Coggill v. American Exch. Bank, 1 N. Y. 113; Meacher v. Fort, 3 Hill (S. C.) 227.

[115] See, supra, p. 141.

[116] Frank v. Lanier, 91 N. Y. 112; Kingston Bank v. Eltinge, 40 N. Y. 391; Heiser v. Hatch, 86 N. Y. 614; Marine Nat. Bank v. National City Bank, 59 N. Y. 67.

[117] Frank v. Lanier, 91 N. Y. 112; Lawrence v. American Nat. Bank, 54 N. Y. 432; Young v. Lehman, 63 Ala. 523; Fraker v. Little, 24 Kan. 598; U. S. v. National Park Bank, 6 Fed. 852.

[118] Welch v. Goodwin, 123 Mass. 77.

[119] Goddard v. Merchants' Bank, 4 N. Y. 147; White v. Continental Nat. Bank, 64 N. Y. 316.

[120] Citizens' Nat. Bank of Davenport v. Importers' & Traders' Bank, 119 N. Y. 195, 23 N. E. 540; Graves v. American Exch. Bank, 17 N. Y. 205.

[121] Bank of British North America v. Merchants' Nat. Bank, 91 N. Y. 106.

to persons claiming under the forged indorsement who have no title as against the true owners, and to whom for the same reason payment cannot be lawfully made.[122] Such persons must rely for their protection upon the warranties implied in the indorsements of prior parties and already explained. Thus the general rules summarized are:

(1) That the payor can recover of the payee claiming through a forgery.

(2) The forgery does not destroy the title of the true owner to the instrument, nor the right to collect it; and

(3) The sole recourse of parties claiming under the forgery is upon the warranties of parties prior to them and subsequent to the forgery.

SAME — PERSONAL DEFENSES.

109. Personal defenses are in general founded upon the agreement or conduct of a particular person with reference to the instrument, by reason of which the courts will not enforce the instrument in favor of the holder if he be a party to the wrong, or of subsequent holders who took the instrument with knowledge of the first holder's wrongful participation.

110. Common personal defenses are:

(a) Those where there is no real intention of the parties to issue or indorse an instrument.

(b) Those where a defense is interposed by reason of some defect in the consideration of the instrument or of its transfer.

(c) Those where the instrument has been discharged as an obligation.

The student has already seen the reason of the classification of defenses into real and personal. Real defenses avail against a bona fide holder; personal defenses do not. Real defenses avail because no contract rights are created by the intended instrument, and

[122] Canal Bank v. Bank of Albany, 1 Hill, 287; Talbot v. Bank of Rochester, 1 Hill, 295; Dick v. Leverich, 11 La. 573.

therefore the bona fide holder can acquire none. Personal defenses do not avail because contracts are created, which, as between immediate parties, are fundamentally lacking in some element necessary for their enforcement, or else because it would be a legal wrong to enforce them as to such parties. For example, bills or notes tainted with fraud or duress in their issue or indorsement lack the vital power of consent. If they are defective in point of consideration there is nothing to sustain the contract, and it must fall to the ground. If the consideration of the instrument or that of its indorsement is illegal, then to allow the enforcement of the contract in violation of law would be a legal absurdity, and so in these and many other cases relief, as between immediate parties, is allowed by courts to the person wronged. But throughout them the student will notice that there is running one common characteristic. They all are based upon some personal act or omission of a nature such that to enforce it as between parties would be to enable the prosecuting party to profit by his own fraud, or take advantage of his own wrong, or found a claim upon his own iniquity. Courts will not lend their active aid to one guilty of such unconscientious conduct, or to one who is in equal wrong with the defendant touching the transaction as to which relief is sought. By allowing the defense this will leave the parties where they find them, without interfering in behalf of either. The maxim is that "he who comes into equity must come with clean hands," and the courts, as between immediate parties, will not enforce the contract in favor of one who is not justly and legally entitled to its enforcement. But this principle does not apply to the bona fide holder who is not a party to the transaction. He has committed no wrong. He knows of no wrong. He has paid value for the instrument, and purchased what he supposed was a good legal title to enforce all the rights it contained or evidenced. Therefore, so far as the act of any third party is concerned, both he and the party complaining of the wrong are equally innocent. But the bona fide holder has the superior equity, in that he has the legal title to the instrument, and for the further reason that of two innocent parties—the party wronged and the bona fide holder—he whose act or omission has caused the loss must bear it. Therefore, as between these two innocent parties, a defense caused by the

act, omission, conduct, or agreement of the wronged person with reference to the instrument is not allowed to the wronged person against the bona fide holder. And thus, in dealing with defenses to actions upon bills and notes in the hands of bona fide holders, the first question for the student to ask himself is whether the defense is real and valid, or personal and not available.

111. FRAUD AND DURESS.—The common personal defenses, where there is no real intention of the parties to issue or indorse an instrument, are fraud and duress.

It is very difficult to furnish the student with any clear and certain tests to determine in all cases the meaning of the defense of fraud in the inception, making, or transfer of a negotiable instrument. The principal reason why fraud is such a defense is that it destroys the effect of the contract as a legal obligation, because, with the party defrauded, there is no full consent to be bound by the obligation which the contract purports to create. But the acts, omissions, concealments, or conduct which go to make up the legal conception of fraud, are in their nature so multiform that to cover their many phases by a set of concise definitions is well-nigh impossible. Mr. Pomeroy says of fraud generally that it includes "all willful or intentional acts, omissions, or concealments which involve a breach of either legal or equitable duty, trust or confidence, and are injurious to another, by which an undue or unconscientious advantage over another is obtained." [123] Sir William Anson declares the test in determining fraud to be whether under the circumstances an action for deceit against the party committing the fraud will lie, and speaks of a fraud "as a false representation of fact, made with a knowledge of its falsehood, or in reckless disregard whether it be true or false, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it." [124] And the text writers upon Contracts generally,[125] treating it as a matter of misrepresentation, which it usually

[123] Pom. Eq. Jur. § 873.

[124] Anson, Cont. pp. 153, 154.

[125] Chit. Cont. p. 750 et seq.; Pol. Cont. p. 512 et seq.; 2 Pars. Cont. 769 et seq.; Lawson, Cont. § 226 et seq.; Clark, Cont. p. 324 et seq.

is, analyze fraud along the lines of Sir William Anson's definition, and, resolving it into the constituent elements, say that there must be (1) false representation of a past or existing material fact, (2) such that the other party has a right to rely upon it, (3) made with either knowledge of its falsity, or with reckless disregard whether it be true or false, (4) intended to be brought to the knowledge of the other party, (5) and that it must deceive the other party, and (6) result in injury to him.[126] Suffice it to say, with regard to these general statements, that they often furnish the test in determining fraud in the case of the giving of negotiable instruments as well as of their indorsements. Their meaning and practical application, however, are so fully discussed in elementary works on Contracts that it is unwise to give further space to the question here.[127]

With negotiable instruments the question that principally concerns us is the position of the bona fide holder. It is safe to say that proven fraud is a defense between immediate parties, but it is a personal defense only, and not in general available against the purchaser of the instrument for value without notice. "The law," says Chief Justice Kent, "has always had a regard to derivative titles, though it may be true as an abstract principle that a derivative title cannot be better than that from which it is derived." [128] And therefore

[126] Clark, Cont. p. 324.

[127] Civ. Code N. Y. 1879, §§ 757, 758. The proposed New York Civil Code classified and defined fraud thus: "Actual fraud consists in any of the following acts committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract. Its elements are (1) the suggestion as a fact of that which is not true by one who does not believe it to be true; (2) the positive assertion in a manner not warranted by the information of the person making it of that which is not true, though he believes it to be true; (3) the suppression of that which is true by one having knowledge or belief of the fact; (4) a promise made without any intention of performing it; (5) any other act fitted to deceive. Constructive fraud consists (1) in any breach of duty which, without an actually fraudulent intent, gives an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; (2) in any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud."

[128] Jackson v. Henry, 10 Johns. 184.

it is that rights derived from the ostensible possessor, taken without any knowledge or notice of his fraudulent possession, and received for value given, will not be disturbed by the courts.[129] From this general principle is developed the settled rule that, it once being established as a fact that the holder of a negotiable instrument is a purchaser for value without knowledge or notice of fraud, he may recover upon the instrument against any prior defrauded party who is not immediate.[130] For with negotiable instruments the equitable rule prevails that if a third person, not knowing of the fraud, and not being put upon his inquiry, buys the instrument for a valuable consideration from one who has obtained it through fraud, the defeasible title of the vendor will be made indefeasible in the hands of the vendee, and he may hold and enforce the instrument. As between the defrauded party and the bona fide purchaser, both of whom are innocent, the law will cast the loss on him whose act, omission, or conduct enabled the defrauder to transmit them to an innocent purchaser.[131] Another reason arises out of the technical relief granted in cases of fraud. The party wronged by a fraud in case of a contract may at his election affirm it, and take from it what benefit he can,—or he may rescind it, and treat the contract as though it had never been made. The operation of this rule presupposes that the contract was until rescission a binding obligation, and, in case of its affirmation, that it continues so. As the law phrases it, the contract affected by fraud is voidable, but not void. Manifestly, this right of rescission should not be extended in its operation against the bona fide holder. If it is to be exercised, it should be only exercised as long as the parties stand in their original relation, and before the rights of third parties intervened. If the party who had the right of re-

[129] Valentine v. Lunt, 115 N. Y. 496, 22 N. E. 209; Simpson v. Del Hoyo, 94 N. Y. 189.

[130] Vosburgh v. Diefendorf, 119 N. Y. 357, 23 N. E. 801; Justh v. National Bank of the Commonwealth, 56 N. Y. 478; First Nat. Bank of Cortland v. Green, 43 N. Y. 298; Farmers' & C. Bank v. Noxon, 45 N. Y. 762; Ocean Nat. Bank v. Carll, 55 N. Y. 440; Grocers' Bank v. Penfield, 69 N. Y. 502; Nickerson v. Ruger, 76 N. Y. 279; Stewart v. Lansing, 104 U. S. 505; Smith v. Livingston, 111 Mass. 342; Sullivan v. Langley, 120 Mass. 437.

[131] Southwick v. First Nat. Bank of Memphis, 84 N. Y. 420; Gridley v. Bane, 57 Ill. 529; Ormsbee v. Howe, 54 Vt. 182.

scission failed to assert it, the innocent purchaser for value should not suffer.

This general principle and the reasons for it rest upon the equities of the case. And so general is fraud in its nature that it cannot be always said that the equities rest with the bona fide holder. Sometimes they preponderate with the party defrauded, in which case the general principle does not apply. Sometimes they are so even that the current of decisions is divided in favor of the party defrauded and of the bona fide holder. In all these doubtful cases the courts generally lay the burden of the loss upon him through whose act it was caused. A question very commonly involved in them is one of delivery, the phase of delivery being either (1) a delivery, through fraud, of a completed instrument, (2) or of an incomplete one, or (3) a delivery through the fraud or violation of the trust reposed in or of the instructions given to an agent or to a third party, or (4) a delivery through mistake or fraudulent misrepresentation as to the character of the instrument intended to be issued.[182] In the case of an instrument complete in form, but delivered through fraud, as, for example, a stolen note, the equities to be weighed are whether nondelivery, which renders the instrument inoperative,[183] should prevail against the rights of a bona fide holder into whose hands it comes. On the one hand it is urged that the instrument never had an inception, so as to enable any person to become the bona fide holder. It is an imperfect instrument, like a blank piece of paper, wanting, to give it vitality, the delivery of the person bound, and intention on his part to contract.[184] On the other hand, it is urged, with what seems the better reason, that if such person had not ultimately intended to be bound, he would not have signed the instrument, and that his leaving a signed instrument whence it could be taken and set into circulation, was an act for which he, and not the bona fide holder, should suffer. The fraudulent possessor of the completed instrument had presumptively the right to transfer it,—and, under the law merchant, the purchaser for value of a completed instrument was not bound to inquire into its origin from the fraudu-

[182] The classification here adopted is that of Mr. Daniel on Negotiable Instruments (chapter 26).

[183] See supra, p. 69.

[184] Hall v. Wilson, 16 Barb. 548; Burson v. Huntington, 21 Mich. 415.

lent possessor; and these two facts determine the equity of the bona fide holder to be superior to that of the defrauded person from whom it was stolen.[185] Where the instrument is not complete, the reasons we have just given do not apply. As long as it was incomplete, the party cannot be presumed to have intended either to be bound by it, or to have put it in circulation, or even to have made a contract at all. And to allow some one else who has stolen it or become fraudulently possessed of it to complete the instrument, and to put it as a binding contract into the hands of a bona fide holder, would be to allow a third person to make a binding contract for another through fraud and without authority. In such cases, where the equities of the defrauded party and the bona fide holder are equal, the law that none but parties or their authorized agents can make binding contracts must prevail.[186] But this last reason does not apply where such person has parted with the possession, leaving blanks unfilled. Such a parting with possession may naturally be supposed to mean that he intended to allow the person to whom he gave the instrument to fill in the blank in the instrument. And a bona fide holder may be warranted in supposing that it was taken with this permission, and without wrong fill them in himself.[187] Therefore

[185] Gould v. Segee, 5 Duer, 260; Marston v. Allen, 8 Mees. & W. 494; Shipley v. Carroll, 45 Ill. 285; Clarke v. Johnson, 54 Ill. 296.

[186] Ledwich v. McKim, 53 N. Y. 307; Baxendale v. Bennett, 3 Q. B. Div. 525. In this case it appeared that the defendant gave H. his acceptance on a stamped paper, and authorized H. to fill in his name as drawer. H. returned the blank acceptance to the defendant in the same state as he received it. The defendant placed it in his desk, from which it was lost or stolen. C. afterwards filled in his own name without the defendant's authority, and the plaintiff brought his action on it as an indorsee for value. The defendant was held not liable, on the ground that after the return of the blank acceptance by H. the defendant had never authorized any one to fill in a drawer's name, and that he had never issued the acceptance intending it to be used.

[187] Redlich v. Doll, 54 N. Y. 234; Mitchell v. Culver, 7 Cow. 336; Page v. Morrell, *42 N. Y. 117; Garrard v. Haddan, 67 Pa. St. 82; Young v. Grote, 4 Bing. 253; Kitchen v. Place, 41 Barb. 465; Douglass v. Matting, 29 Iowa, 498; McDonald v. Muscatine Nat. Bank, 27 Iowa, 319; Harris v. Berger, 15 N. Y. St. Rep. 389; Town of Solon v. Williamsburgh Sav. Bank, 114 N. Y. 122, at page 136, 21 N. E. 168; Davis Sewing Mach. Co. v. Best, 105 N. Y. 59, 11 N. E. 146.

the equities return again to the side of the bona fide holder, and he may enforce the note against the defrauded party.

In case of delivery through fraud or violation of the trust reposed in, or of the instructions given to, an agent or to a third party who holds the instrument, the cases are of two classes. The person holding the bill or note may be either an agent, or merely its custodian. In case of agency, the principal has parted with the paper with the intention of disposing of it, though in its disposition the agent has committed a fraud, breach of trust, or acted in violation of his principal's instructions. In case of paper held by a custodian, there is no intention of the person sought to be charged to part with the paper until some event or contingency has happened, in which case the holder is empowered and becomes an agent to deliver. In both of these classes the balance of equities is, on the one hand, between the undoubted legal proposition that no man can be divested of his own property without his own consent, and that consequently even the honest purchaser of personal property cannot hold against the true proprietor, and, on the other hand, the fact that the party sought to be charged and the bona fide purchaser are equally innocent of wrong, and one of them must suffer a loss. The adjustment of these conflicting equities turns upon the point that the party sought to be charged has by his voluntary act conferred upon the agent or custodian through whom the bona fide purchaser derives his title either the apparent right of property, as owner, or of disposal, as agent, or else has clothed him with such evidence of the right to transfer as to imply authority of disposal. And a rule, whose justice cannot be disputed, is laid down, that where one of two innocent parties must suffer by the fraud or wrong of a third person, the one who put it in the power of such third person to commit such fraud or wrong must bear the loss.[188]

The fourth and last class of cases is that of instruments delivered through mistake or fraudulent misrepresentation as to the character of the instrument to be issued. An elementary example illustrating the principle involved, though not exactly covered by the

[188] Redlich v. Doll, 54 N. Y. 234; Saltus v. Everett, 20 Wend. 267; Vallett v. Parker, 6 Wend. 615; Smith v. Moberly, 10 B. Mon. 269; Passumpsic Bank v. Goss, 31 Vt. 315; Bonner v. Nelson, 57 Ga. 433.

statement of the rule, is where a negotiable instrument is written over a signature put, without any intention of entering into a contract, upon a blank piece of paper. This is clearly a forgery, and so for that reason alone the bona fide holder cannot hold the maker or acceptor. But weighing the equities of the maker or acceptor with those of the bona fide holder, this case is to be distinguished in principle from those last stated. The maker or acceptor, by his own act, has not put it in the power of another to perpetrate the fraud. No fault can be imputed to them. They did not intrust their signature to the possession of another for the purpose of making a binding contract. And therefore the maker or acceptor stands side by side with the bona fide holder, each equally innocent, but with the bona fide holder holding his right through the crime of a third person, and so holding a lower grade of right than that of the maker or acceptor.[139] From this elementary case a theory is easily developed to apply to cases of bills or notes procured from aged, infirm, or illiterate persons, and from them to cases of persons executing instruments under mistake and misrepresentation, which are governed by the same principle. With them all there is no intention to put a negotiable instrument into circulation. The aged, infirm, or illiterate person, like a blind man, does not know what he signs.[140] He no more enters into a contract than he who puts his signature on a blank piece of paper. And for a like reason, if a person can be ascertained to have issued without negligence a negotiable instrument, being led by fraud or mistake to think he was signing some document other than a bill of exchange or promissory note, the same reason in theory would apply, and he would be exempt from liability. But this last statement of the rule is rather one of consistent theory than of usual occurrence. A case can hardly be supposed to which the rule would not apply that a person capable of consent and of understanding the contents of a document should be bound to know the character of the negotiable instrument he signs. If the person capable of consent and understanding, signs commercial paper without an understanding of its character, it is negligence on

139 Caulkins v. Whisler, 29 Iowa, 495; Nance v. Lary, 5 Ala. 370.

140 Putnam v. Sullivan, 4 Mass. 45; Foster v. Mackinnon, L. R. 4 C. P. 704; National Exch. Bank v. Veneman, 43 Hun, 241.

his part. And for this reason, in contrasting his rights with those of the innocent purchaser for value, the scale of equities generally turns in favor of the latter. Hence the majority of the decisions lay down the rule that the failure of the maker or acceptor to use all means to ascertain the nature and character of the instrument he signed, is negligence which makes him liable to the bona fide holder.[141]

Duress and Undue Influence.

Although there is a wide variance in the decisions and authorities upon the subject, it would seem that this principle would also apply to negotiable instruments infected with duress. Duress, as applied to bills and notes, consists in actual or threatened violence or imprisonment. The subject of it must be the contracting party himself, or his wife, parent, or child. It must be inflicted or threatened by the other party, or else by one acting with his knowledge and for his advantage.[142]

The doctrine of some of the authorities is that a bona fide purchaser for value does not acquire a good title to paper which he has bought from one who has procured it by undue influence, compulsion, or coercion. They distinguish duress from fraud in that in case of fraud there is a voluntary parting with the possession of the property, and an uncontrolled volition to pass the title. But in case of duress, where there exists coercion, threats, compulsion, or undue influence, there is no such volition. There is no intention nor purpose but to yield to moral pressure for relief from it, and therefore it is maintained that a case is thus presented more analogous to a parting with property by robbery, and that no title can be made through a possession thus acquired.[143] But in criticism

[141] Chapman v. Rose, 56 N. Y. 137; National Exch. Bank v. Veneman, 43 Hun, 241; Douglass v. Matting, 29 Iowa, 498; Snirts v. Overjohn, 60 Mo. 315; Ort v. Fowler, 31 Kan. 478, 2 Pac. 580. But see, contra, Hubbard v. Rankin, 71 Ill. 129, governed by statute; Gibbs v. Linabury, 22 Mich. 492; Cline v. Guthrie, 42 Ind. 227.

[142] Anson, Cont. p. 164.

[143] Barry v. Equitable Life Assur. Soc., 59 N. Y. 587; Loomis v. Ruck, 56 N. Y. 462; Huguenim v. Baseley, 14 Ves. 273, 3 Lead. Cas. Eq. 94, 463; Eadie v. Slimmon, 26 N. Y. 9; Gardner v. Gardner, 34 N. Y. 155; Voorhees v. Voorhees, 39 N. Y. 463; Tyler v. Gardiner, 35 N. Y. 559; Kinne v. Johnson, 60 Barb. 69; Ferris v. Brush, 1 Edw. Ch. 572; Fry v. Fry, 7 Paige, 461.

of the authorities cited it may be said that, so far as they relate to negotiable paper, they do not bear out what is claimed for them by the text writers.[144] Loomis v. Ruck and Barry v. Equitable Life Assurance Society are illustrations. In Loomis v. Ruck the signature of a married woman was given under duress to a note for the sole benefit of her husband, to the plaintiff, who, at the time of the duress, was present. It is true that the statement of the New York court of appeals was that a bona fide holder cannot enforce a note against the maker which was given by him under duress, but this statement is, in fact, obiter dictum, because the plaintiff in the case was not a bona fide holder. Neither does the case of Barry v. Equitable Life Assurance Society affect the position, because that relates to the assignment of a life insurance policy, which is a mere chose in action, to which the doctrines of negotiability do not attach. And it would seem that, in balancing the equities of the bona fide holder with those of the person who has suffered duress, the duty of extreme diligence should rest upon the latter.[145] It seems to be the opinion that instruments executed under duress are voidable, and not void.[146] And it would therefore be sound business policy to hold that if the party suffering duress has his election to affirm or rescind he should, upon being relieved of the duress, at once exercise his option to rescind and recover possession of the instrument itself. If he failed to do this it would be negligence on his part which would throw the equities to the side of the bona fide holder and protect him in his title to the instrument.[147] But if, on the other hand, recovery of possession of the instrument is impossible, and no fault or negligence can be imputed to the person suffering duress, then it must be conceded that his case is that of

[144] Daniel, Neg. Inst. §§ 857, 858; Tied. Com. Paper, § 287.

[145] First Nat. Bank v. Green, 43 N. Y. 298.

[146] Hogan v. Moore, 48 Ga. 156; Ormes v. Beadel, 2 De Gex, F. & J. 333. In Duncan v. Scott, 1 Camp. 100, it was held that, where the defendant was not a free agent when he drew the bill, it was the duty of the plaintiff to produce evidence of consideration. In the case of Clark v. Pease, 41 N. H. 414, it was held that, where duress is shown in the making or in the circulation of the note, there is imposed upon the plaintiff the burden of showing that he is a bona fide holder for value.

[147] Veach v. Thompson, 15 Iowa, 380; Clark v. Pease, supra; Rogers v. Adams, 66 Ala. 600.

a person sought to be charged upon an obligation which he never entered upon, and that the bona fide holder has no superior equity to support his position, and that in reason and in justice he ought not to recover against a person whose obligation had its inception in facts which almost constitute a crime.

112. CONSIDERATION.—Consideration is the legal reason for a contract being binding.

113. Any consideration which will support a simple contract is sufficient to support a negotiable bill or note, or the transfer or indorsement thereof.

In case of negotiable instruments consideration is presumed, but this presumption may be rebutted.

Text writers in their definitions of "consideration" unite in quoting that given by the exchequer chamber.[148] "A valuable consideration in the sense of law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." [149] And this declaration of Lush, J., is perhaps the best categorical statement of the subject yet made. But it does not explain the part that consideration plays in the general theory of contract. And therefore we purpose to explain briefly the meaning of consideration and what its necessary elements are, and then show its application to the theory of bills and notes.

Consideration is the accepted evidence of the fact that the parties to a contract intend to enter into a binding legal obligation. In examining all contracts the courts first ask themselves whether there was a mutually communicated intention common between the parties to act or forbear towards one another, and if they find there was, then they ask whether the agreement made between the parties was such that it must be enforced. And the other terms, elements and conditions of the agreement being according to law, the test whether it is a binding legal obligation and one to be enforced turns upon the question whether or not there was present a legal

[148] Currie v. Misa, L. R. 10 Exch. 153.

[149] Com. Dig. "Action on the Case," bk. 1, p. 15.

consideration. The consideration, in law, therefore, is the reason for making the contract. If it is present the courts assume that the parties intended to enter into a legal obligation; if absent, then, although there may have been a promise or meeting of the minds, yet there is no legal reason why this promise should not be retracted or this consensus revoked, because neither party has lost or gained anything of substantial value. The agreement is too frivolous for courts to consider, and is said to be "nudum pactum ex quo non oritur actio."

The first element of a consideration is that it must have value. According to Sir William Anson,[150] the matter of a legal obligation must possess or must be reducible to a pecuniary value. This merely means that there must be some ascertainable quid pro quo. Mr. Langdell, in his summary of the law of contracts, shows the evolution of the theory of consideration from the exact quid pro quo necessary to create a debt to the varieties of consideration stated in the definition of Lush, J., which are sufficient to support an assumpsit. There it appears that the doctrine of consideration originated in the action of debt, which originally was an action to recover an exact sum of money loaned belonging to the creditor, but in fact in the possession of the debtor. The right was in the creditor to recover of the debtor the possession of his money which the debtor thus held. From these rudimentary notions the idea of consideration as a basis of the action of debt was developed through various stages until it reached the point that the consideration of contracts of debt required (1) that the consideration given or done should be given or done to the obligor directly, (2) and for him directly; (3) that it should be received by the obligor as the full equivalent for the obligation assumed, and (4) be actually executed. But at all times the contract which was the basis of debt required that there be an exact quid pro quo between its parties. And in case of debt, unless all these elements of consideration were present, the creditor or obligee could not have his remedy in an action of debt, because all of these considerations were of the essence of debt. By the statute of Edw. I.,[151] the action of assumpsit was created to reach that large class of cases which were not debts, but

[150] Anson, Cont. pp. 6, 7; Poll. Cont. p. 8. [151] 13 Edw. I. c. 24.

yet were analogous to them. These were seen to be a class of rights which were evidently rights based upon some sort of an agreement, which, however, was not in its turn based upon a consideration complying with all the requisites we have stated. The contract had not a consideration sufficient for it to support an action of debt. By the later rules the agreements for which assumpsit lay need not have an exact quid pro quo, but there was, nevertheless, required some exchange of values in it for the agreement to be binding in law, or so that it could be enforced by courts in assumpsit. Hence the doctrine of consideration sufficient to support an assumpsit was developed into its present stage, its necessary elements being those stated in the definition of Lush, J., we have given. And thus we find that the courts have held a sufficient consideration to be a cross acceptance,[152] or the forbearance of the debt of a third person,[153] or the compromise of a disputed liability,[154] or a promise to give up a bill thought to be invalid,[155] or a debt barred by the statute of limitations,[156] or a debt discharged in bankruptcy.[157] The courts, on the other hand, have held insufficient considerations to be a mere moral obligation,[158] or a debt represented to be due, though not really due,[159] or the giving up a void note,[160] or a voluntary gift of money.[161] And that the distinction between these cases rests upon whether the different considerations are or are not of any actual value.

If there is actual value it will suffice, irrespective of the fact of its adequacy. The courts do not sit to make bargains for the

[152] Rose v. Sims, 1 Barn. & Adol. 526.

[153] Balfour v. Sea Fire Life Assur. Co., 3 C. B. (N. S.) 300; Meltzer v. Doll, 91 N. Y. 365.

[154] Cook v. Wright, 30 Law J. Q. B. 321.

[155] Smith v. Smith, 13 C. B. (N. S.) 418.

[156] La Touche v. La Touche, 3 Hurl. & C. 576 (it was held in this case that a promissory note given by a married woman as a security for advances made to her husband, and which in equity binds her separate estate, is a good consideration for another promissory note given by her after her husband's death for a balance then due, although the former note is barred by the statute of limitations); Wilton v. Eaton, 127 Mass. 174.

[157] Trueman v. Fenton, Cowp. 544.

[158] Eastwood v. Kenyon, 11 Adol. & El. 438.

[159] Southall v. Rigg, 11 C. B. 481.

[160] Coward v. Hughes, 1 Kay & J. 443.

[161] Hill v. Wilson, L. R. 8 Ch. App. 894.

parties. Their only inquiry is whether one has been made. And whether, therefore, the party making the bargain has gained or lost by it is immaterial, so far as its legality as an obligation is concerned.[162] And the rule is well settled that the consideration need not be adequate, though it must be of value. But there is the distinction[163] made between a valuable consideration other than money and a money consideration. With a valuable consideration other than money, the slightest consideration will support a promise to pay the largest amount to the full extent of the promise, while with a money consideration the consideration will support a promise to pay money only to the extent of the money forming the consideration. The law is deemed to leave the measure of the value of a valuable consideration other than money for a promise to pay money to the parties to the contract; but money, being the standard of value, is not subject to be changed by contract, and will support a promise to pay money only to the amount of the consideration.

Consideration is also classified as to the time at which it is given, as executory, executed and past. An executory consideration is something to be given or done in the future; an executed consideration is some act or forbearance done at the time of making the contract;[164] and a past consideration is one fully performed before the agreement or transaction which is the basis of the contract relation sought to be created, has come into existence. The two former satisfy the test of a consideration that it be sufficient to create a legal obligation. Each of them is a sufficient legal reason for supporting a contract relation. But the third does not satisfy that test. Whatever the transaction constituting the past consideration may have been, it is no part of the transaction upon which the contract is based. There may have been some moral obligation created by it. It may have been the motive for making the new contract. But neither of these cases has the pecuniary value which is required for a consideration, and neither can be treated as a consideration sufficient to support a new contract,[165]

[162] Pilkington v. Scott, 15 Mees. & W. 660; Bainbridge v. Firmstone, 8 Adol. & E. 743; Darrow v. Walker, 48 N. Y. Super. Ct. 6.

[163] Sawyer v. McLouth, 46 Barb. 350; Johns. Cas. Bills & N. 175.

[164] Leake, Cont. 181.

[165] Lawson, Cont. § 100; Anson, Cont. pp. 77–81; Clark, Cont. §§ 84–90.

although it may be their outgrowth. A past consideration is therefore to be rejected from considerations sufficient to support contracts,—a fact to be kept in mind in the examination of the question commonly known as the theory of the antecedent indebtedness, hereinafter discussed.[166]

Presumption of Consideration.

Before taking up the phases of want, failure, or illegality of consideration, so common in cases of bills and notes, it remains to speak briefly of the meaning of that common phrase that with negotiable instruments, in the first instance, consideration is presumed. This relates to controversies between immediate parties, and means that, if there is no issue as to the consideration, then the mere production of the instrument on the trial is sufficient.[167] But where the issue between immediate parties specifically pleaded is consideration, then the statement in the instrument of value received is in the nature of an admission against interest, and nothing more. The burden of proof of the existence of a consideration is on the plaintiff, and in case of a conflict of evidence, it remains on him to satisfy the jury by preponderance of evidence.[168] The fact that a consideration has been given is stated in the instrument, and that the instrument is in writing does not exclude oral evidence concerning the consideration. And if the instrument was without consideration in fact, although it is stated on its face to have been given for a consideration, this may be shown by extrinsic testimony[169] when the issue is as to the consideration. It seems to have been the early doctrine that, in order to enable the defendant to put the plaintiff on proof of consideration, he must give the plaintiff notice. But it is the rule of practice at present that a notice to prove consideration is unnecessary, and it is not

[166] See pages 293, 294, post.

[167] Carnwright v. Gray, 127 N. Y. 92, 27 N. E. 835. A general denial is insufficient to raise the issue of consideration. Sprague v. Sprague, 80 Hun, 285, 30 N. Y. Supp. 162.

[168] Bruyn v. Russell, 60 Hun, 280, 14 N. Y. Supp. 591; Perley v. Perley, 144 Mass. 104, 10 N. E. 726; Simpson v. Davis, 110 Mass. 269; Delano v. Bartlett, 6 Cush. 364; Anthony v. Harrison, 14 Hun, 198. But possibly a contrary doctrine is held in Bottum v. Scott, 11 N. Y. St. Rep. 514; Olsen v. Ensign, 7 Misc. Rep. (N. Y.) 682, 28 N. Y. Supp. 38.

[169] Abb. Tr. Ev. pp. 404, 405.

now given. An allegation in the answer that the note is without consideration is sufficient. At present the plaintiff makes out his prima facie case; the defendant then gives evidence in dispute of the consideration,—whereupon the plaintiff calls his witnesses in rebuttal of this, to prove it.[170]

114. Defenses interposed by reason of some defect in the consideration are usually want or failure of consideration, and illegality of consideration, which does not avoid the instrument.

115. As between immediate parties, a partial want or failure of consideration is a defense pro tanto, but the part alleged to have failed must be clearly ascertained. But these are not defenses to an action brought by a purchaser of the instrument for value without notice.

116. When there is a total want of consideration between immediate parties, or the consideration of the note, though good in the first instance, entirely fails, this is a defense between immediate parties. But these are not defenses to an action brought by a purchaser of the instrument for value without notice.

In the preceding section, in attempting to outline the fundamental theory underlying that very large branch of the subject of negotiable instruments,—consideration,—we endeavored to show that the rule was that the first test of a legal consideration was that it must have substantial value, and that if there was substantial value, and an agreement, then there was a legal contract. From this it naturally follows that the converse of this rule is also true, and that if there is not a consideration to support the contract, or if there is what seems to be, but in fact is not, a consideration, then the contract itself fails, and the contract will not be enforced by the courts. The doctrines of want or failure of consideration divide themselves into the questions arising from total want or failure of consideration, partial want or failure of consideration, and the comparative equities of the rights of immediate parties

[170] See Wood's notes to Byles, Bills & N. pp. 121, 122.

and of the bona fide holder. The doctrine of failure or want of consideration is to be scrutinized to distinguish between failure of consideration and inadequacy of consideration; between whole and partial failure of consideration; and between definite and indefinite want or failure of consideration. And while it cannot be said that these positions are fully settled by authority the general doctrines of the cases classify the rules relating to want or failure of consideration as follows:

(1) Total failure or want of consideration is a defense in an action between immediate parties.

(2) In case of a pecuniary consideration or of property having an agreed pecuniary standard, failure of a definite part of the consideration is a defense pro tanto between immediate parties.

(3) In case of partial failure of an unliquidated consideration, recoupment or counterclaim may be allowed.

(4) A want of a defined part of a consideration is a defense pro tanto.

(5) Defenses of total or partial failure or want of consideration do not avail against the purchaser for value without notice.

Failure or want of consideration is not the same thing as its inadequacy. Inadequacy means that where values are exchanged one value does not equal the other; failure of consideration means a diminution of value from that expressly or impliedly agreed to be the values exchanged in transfer; and want of consideration means no value at all given for value received. In the transfer of property the fact that the property was not worth what it was supposed to be, if there is no fraud, is no defense in an action for the purchase price. And when the question is one of adequacy, courts will not inquire into the actual pecuniary value of a consideration, but will leave the parties to such estimates thereof as they have formed in making their contract. A party will not be allowed to interpose as a defense the fact that the property was not pecuniarily worth what he supposed it to be, or that he has received no actual benefit from it, or that the other party derives greater benefit from the consideration than he does. And inadequacy is distinguished from failure or want of consideration in that at the time of making the bill or note no part of the consideration was wanting, or that no part of it had subsequently failed. It was complete on making the con-

tract, and had changed in no respect at the time of bringing the action. The amount agreed to be paid in the bill or note was the value set by the parties upon the consideration itself, and courts do not sit to change this and to make contracts, but only to enforce those the parties have already made.[171]

Except, then, where money is paid for a bill or note, any other valuable thing will suffice as a reason for the enforcement of the instrument. In such cases as a voluntary gift of a note;[172] or its indorsement as a gift;[173] or where a plaintiff and defendant, as executors of an estate, exchanged notes with the intent of assuring payment against each other in an impending arbitration, and it was sought to construe these notes as promises which charge them personally;[174] or where two persons gave notes contingent upon the fact that, if they were paid in the future, the payee would convey to him certain lands, which in fact were never conveyed,—in all such cases, we say, there is no consideration for the promise. In them the promise is a nudum pactum. The courts will not compel parties to pay money to a party from whom they, in turn, had received nothing. Hence the entire want of consideration between immediate parties destroys all remedy upon the bill or note, because, as between immediate parties, the negotiable instrument is governed in this respect by the general rules of contract law.

These reasons, however, do not apply where the consideration has changed in whole or in part from that in contemplation of the parties at the time of making the contract. Its change may have rendered it either totally or partially worthless. In case of partial worthlessness, the worthless part may be a clearly defined part of the whole, or be indissolubly bound up with it. And these aspects of failure of consideration, when complicated with the various different systems of the administration of remedies, have presented problems of some difficulty for the courts to decide, and this diffi-

[171] Worth v. Case, 42 N. Y. 362; Earl v. Peck, 64 N. Y. 596; Hamer v. Sidway, 124 N. Y. 538, 27 N. E. 256; Anson, Cont. 63; Shadwell v. Shadwell, 9 C. B. (N. S.) 159; Lindell v. Rokes, 60 Mo. 249; Trickey v. Larne, 6 Mees. & W. 278; Tye v. Gwynne, 2 Camp. 346.

[172] Pearson v. Pearson, 7 Johns. 26.

[173] Schoonmaker v. Roosa, 17 Johns. 301.

[174] Winter v. Livingston, 13 Johns. 54.

culty has resulted in some confusion in the decisions of various jurisdictions. The rules are the same whether the consideration which fails be executed or executory. Examples of an executed consideration which has failed are property for which a note has been given, but which has been taken in execution,[175] or notes given for insurance premiums upon the policy of a company which has no legal right to insure.[176] In both of these cases it was held that there was a total failure of consideration, and that, as between immediate parties, it was a sufficient defense.[177] The availability of this as a defense, however, seems to depend upon two alternatives. The transaction either must be at once rescinded, the consideration returned, and the parties placed as nearly as may be in statu quo,[178] or else the consideration must be proved to be completely worthless, for otherwise, if the consideration be retained, the question is sometimes treated as one of inadequacy, and the obligation may be deemed

[175] Chenault v. Bush, 84 Ky. 528, 2 S. W. 160.

[176] Barbor v. Boehm, 21 Neb. 450, 32 N. W. 221.

[177] Lightbody v. Ontario Bank, 11 Wend. (N. Y.) 9. This was a case where bank bills were received in payment, and the bank issuing the bills had stopped payment at the time when the bills were so received, but the fact of the bank's failure was not then known to the parties. In his decision, Savage, C. J., said: "The question is which of these parties shall sustain the loss which has happened in this case. * * * In the case of the payment of a counterfeit or forged bill, it is settled that the debtor is not discharged, and it is not perceived why the same principle should not prevail where the payment is made in the bill of a bank which has stopped payment. In each case the debtor parts with that which has no value, and the creditor does not receive value for his debt." In the case of Camidge v. Allenby, 6 Barn. & C. 373, 9 Dowl. & R. 391, it appeared that a vendee delivered to the vendor, in payment for goods, promissory notes on the bank of D. & Co. This occurred at 3 o'clock in the afternoon, and D. & Co. stopped payment at 11 o'clock in the forenoon of the same day (December 10th). The vendor never presented the bills, but on December 17th he required the vendee to take back the notes, and pay him the amount. This was refused, and on trial it was held that the vendor was guilty of laches, and had thereby made the notes his own, and consequently that they operated as a satisfaction of the debt. In the case of Bayard v. Shunk, 1 Watts & S. (Pa.) 92, it was held that the debt was discharged by a payment in bank notes, though the bank had previously failed, both parties being ignorant of the fact.

[178] Burton v. Stewart, 3 Wend. 236; Lewis v. Cosgrave, 2 Taunt. 2; Leggett v. Cooper, 2 Starkie, 103; Fisher v. Samuda, 1 Camp. 191.

binding.[179] Cases of executory consideration are where the purchaser of a patent gave his note for it and the patent subsequently proved void,[180] or where a vendee bought goods of a certain kind which the vendee failed to deliver.[181] In such cases the rules are also either that there must be instant rejection of the goods after an opportunity to examine them, or else the goods must be shown to have been valueless. Of course, if there was involved in the facts of the case a breach of warranty which survives the acceptance of the goods, it lays the basis for a cross action or counterclaim, and is an exception to the principle stated.[182] It is the better rule in case of executory considerations that, as between immediate parties, a partial performance of the consideration allows only a recovery for the part performed upon the bill or note given for the consideration itself,[183] though this rule is disputed by many cases.[184] This conflict of authorities is due not so much perhaps to the actual merits of the question as to rules of practice arising upon questions of recoupment, offset, cross demand, and counterclaim, and whether these remedies may be administered in the action in which recovery upon the bill or note is sought. But these questions are happily becoming obsolete as state after state substitutes the civil action and code procedure for the common-law action and equity suit. The provision of the Codes that a defendant may avail himself of any defense which tends to defeat or diminish the plaintiff's recovery and which is a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action, or that it may be any new matter constituting a defense, it is hoped will allow the establishment of a rule that a failure of a part of the consideration, if definite, will allow a recovery pro tanto; if indefinite, a recoupment of damages. Now,

[179] Burton v. Stewart, 3 Wend. 236; Johnson v. Titus, 2 Hill, 606.

[180] Dickinson v. Hall, 14 Pick. 217.

[181] Wells v. Hopkins, 5 Mees. & W. 7.

[182] Norton v. Dreyfuss, 106 N. Y. 91, 12 N. E. 428; Brigg v. Hilton, 99 N. Y. 517, 3 N. E. 51; Day v. Pool, 52 N. Y. 416.

[183] Sawyer v. Chambers, 44 Barb. 43; Union Foundry & P. C. W. Works v. New York L. D. Co., 13 N. Y. St. Rep. 701; Fisher v. Sharpe, 5 Daly, 214; Murphy v. Lippe, 35 N. Y. Super. Ct. 542.

[184] Fletcher v. Chase, 16 N. H. 38; Stone v. Peake, 16 Vt. 218; Harrington v. Lee, 33 Vt. 249; Evans v. Williamson, 79 N. C. 96.

however, the rules seem to be somewhat ill-defined, but as nearly as may be stated are as follows:

(1) If there is entire failure to give good title to chattels or land it is a defense;[185] if it is a mere defect of title capable of ascertainment in money, and the loss is borne by the purchaser, it is a defense pro tanto;[186] if it is a defect in which the loss is not borne by the purchaser, it is not a defense.[187]

(2) If the failure is of part of a money consideration, or one capable of definite computation, it is a good defense pro tanto.[188]

(3) If the failure is in the value of goods delivered, and is incapable of ascertainment, it is no defense, being in the nature of inadequacy of consideration, as already shown. But if this failure in value is a distinct part of the consideration, and is due either to a failure of the quality or the quantity of the goods, it is a defense pro tanto.[189]

(4) If the failure of consideration arises from failure to perform an agreement, it is a defense pro tanto.[190]

These reasons apply to want of consideration,[191] or want of a defined part of it.[192] In the former event the contract is unenforce-

[185] Rock v. Nichols, 3 Allen, 342; Morrow v. Brown, 31 Ind. 378; Peterson v. Johnson, 22 Wis. 21; Stewart v. Insall, 9 Tex. 397.

[186] Doremus v. Bond, 8 Blackf. 368; Holman v. Creagmiles, 14 Ind. 177.

[187] Bringham v. Lighley, 61 Ind. 524.

[188] Byles, Bills, 132; Chit. Bills, 86; 1 Edw. Bills & N. § 469; Darnell v. Williams, 2 Starkie, 166; Jefferies v. Austin, Strange, 674; Gamble v. Grimes, 2 Ind. 392; Morgan v. Fallenstein, 27 Ill. 31; Black v. Ridgway, 131 Mass. 80.

[189] Agra & Masterman's Bank v. Leighton, L. R. 2 Exch. 56. It was held in this case that, in an action by the indorsee of a bill of exchange against the acceptor, a plea stating that the bill was given for goods to be supplied by the drawer, and that only part of the goods were supplied, of which the defendant accepted a part, and that by reason of the non-completion of the contract the part supplied became valueless to him, and also showing that the plaintiff is not a holder for value, will be good. And see Dunnent v. Tuttle, Johns. Cas. Bills & N. 178. Hammett v. Barnard, 1 Hun, 198. Though see cases holding no defense unless there was a warranty. Welch v. Carter, 1 Wend. 185; Reed v. Prentiss, 1 N. H. 174; Bryant v. Pember, 45 Vt. 487; Detrick v. McGlone, 46 Ind. 291; Richards v. Betzer, 53 Ill. 466.

[190] Watson v. Russell, 3 Best & S. 34; Miller v. Wood, 23 Ark. 546; Jeffries v. Lamb, 73 Ind. 202.

[191] Anthony v. Harrison, 14 Hun, 198.

[192] Seeley v. Engell, 13 N. Y. 542.

able; in the latter, enforceable only pro tanto.[193] And this leaves us to consider the position of the bona fide holder when confronted with these defenses raised against him.

The purchaser for value without notice purchases upon a consideration an order or promise to pay money. He is not bound in any way to inquire into the circumstances which gave the paper birth. If, for example, the maker defends that the consideration for a note is a contract which is wholly or partly unperformed, and the consideration has so far failed, the answer is that the maker has issued to the world a negotiable promise to pay money absolutely in consideration of the promise of the payee to do some act for his benefit in the future. That the payee has failed to do this is no reason why the bona fide holder should be deprived of the benefit of the maker's promise, which he has bought. He has taken no part in the delinquencies of the payee, and they therefore cannot be charged against him. In other words, his equities are superior to those of the maker, who must look for his remedy to the payee.[194] And so in the other cases involving want or failure of consideration, the defenses consist of personal transactions between immediate parties, in which the bona fide holder has no part, and with which he is not chargeable. The reasons for holding accommodation parties have been already explained.[195] And in other cases already mentioned, as for patents proven void,[196] or for the purchase of lands to which the title fails,[197] or for goods purchased and partly delivered,[198] the answer is the same,—that an absolute promise or acceptance to pay to order has been issued, and must be lived up to, when in the hands of a purchaser who has bought it in reliance upon the promise.

117. ILLEGAL CONSIDERATION. — A consideration may be rendered illegal by statute, or by the rules of common law, or because it is against public welfare to

[193] Aubert v. Maze, 2 Bos. & P. 373; Forman v. Wright, 11 C. B. 481; Parish v. Stone, 14 Pick. 198.

[194] Davis v. McCready, 17 N. Y. 230.

[195] See supra, p. 173.

[196] Smith v. Hiscock, 14 Me. 449.

[197] Vallett v. Parker, 6 Wend. 615.

[198] Baldwin v. Killian, 68 Ill. 550.

treat the consideration as a valid legal consideration. An illegal consideration, whether total or partial, renders the instrument unenforceable, as between immediate parties, but it is not in general a defense to the action of the purchaser for value without notice.

A brief statement of that broad topic of the general law of contracts known as "illegal consideration" is as follows:

Since every contract is but an agreement enforceable by law, to be enforceable it must be for some object which the law can recognize. The law refuses to recognize rights arising out of three general classes of subjects, and to enforce contracts made with reference to them. They are:

(1) Those prohibited by statute.

(2) Those prohibited by express rules of common law with reference to objects which the law deems evil or immoral.

(3) Those which contravene public policy.

Statutory Prohibition.

The statutes which prohibit considerations and render them illegal are commonly classified as follows:

(1) Those which forbid a transaction constituting a consideration, and declare the contract growing out of it void.

(2) Those which, for the public welfare, attach a penalty to a transaction constituting a consideration, and thus by implication forbid the making of any contract growing out of it.

(3) Those which declare a consideration illegal, but do not say that it shall avoid the contract.

(4) Those which attach no penalty to a consideration, but which enact that the consideration is illegal, and that the agreement resting upon it shall not be enforced.

(5) Those which enjoin certain penalties, conditions, or regulations upon the conduct of a business or profession, but which attach no specific penalty to any specific transaction.[199]

These five classes of statutes are in turn distinguished as those which avoid the consideration, either by express declaration, or by imposing a penalty upon it, and those which merely declare the con-

[199] Pol. Cont. pp. 254–261.

sideration illegal. The important difference between these two classes is that, as already shown, the former is a defense to the instrument in the hands of a bona fide holder,[200] while the latter is not. The statutes of the latter class, however, so generally outnumber those of the former, that it may be said to be the rule that the title of an innocent holder for value cannot be impeached by any illegality in the transactions between prior parties,[201] the exceptions being, of course, where the statutes expressly forbid the consideration and avoid the contract growing out of it, or where the plain intention of the penalty affixed by the statute to the transaction is to forbid it, and thus the contract is avoided. The reason for this rule is the one so general in cases involving consideration, that when one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.[202] It is true that the innocent maker or acceptor may suffer from the violation of a statute which was perhaps meant to protect him. Either or both of these prior parties may have done something forbidden, and the court in enforcing the bill or note may be enforcing a violation of the statutes, yet the bona fide holder is no accessory to the illegality, nor can the statute be used to shield the wrongdoer. The transaction, whatever it may have been, was one of which the bona fide holder knew nothing, and in which he took no part. The only thing with which he had to do was the purchase of a promise or order to pay money, which he asks the court to enforce. And the courts respond to his suit by saying to the prior parties

[200] See supra, pp. 223–225. It was said by Christiancy, J., in Paton v. Colt, 5 Mich. 505, that whenever the consideration of the paper between the original parties has been illegal, especially if in violation of a positive prohibition of statute, proof of such illegality throws upon the holder the burden of proving that he got it bona fide, and gave value for it. To the same effect, see Bailey v. Bidwell, 13 Mees. & W. 73; Harvey v. Towers, 6 Exch. 656; Northam v. Latouche, 4 Car. & P. 140; Vallett v. Parker, 6 Wend. (N. Y.) 615; Story, Bills, § 193.

[201] Thus, in Potter v. Tubb, 1 Chit. Jr. Bills, 430, which was an action against the acceptor of a bill, by the payee, it was held that the fact the consideration for the acceptance was a debt due to the drawer by the acceptor for smuggled goods was no defense against the plaintiff, unless the bill were given him for a smuggling debt.

[202] Vallett v. Parker, 6 Wend. 615; Willmarth v. Crawford, 10 Wend. 341.

who have suffered by or committed the illegality that their wrongs must be settled elsewhere than in his suit,[203] and are no answer to his claim.

The statutes which declare a consideration illegal vary widely in their topics and language in the different states. Very common examples are a bill or note executed on Sunday,[204] or a bill or note given for intoxicating liquors.[205] These cases are but examples of the general principle, whatever be the wording of the particular statute. Thus, from the New York point of view, before the repeal of the Sabbath observance act,[206] a contract made on Sunday was not void at common law. And in New York it was declared to be good unless it was in contravention of some express statute forbidding it.[207] The statute in that state regulating the Sabbath observance was meant to be in harmony with the religion of the state and the religious sentiment of the public, and for the support and maintenance of public morals and good order. Acts which did not violate the purpose of this statute, and did not disturb and hinder those who for themselves desired to enjoy Sunday, were not prohibited.[208] Bargains made on Sunday were enforceable. And it is to be inferred that bills and notes given on Sunday were good unless they were for something prohibited by statute to be done, as for the enforcement of work done on Sunday exclusively.[209] So that in New York, although there is little express authority on the point, it seems safe to say that since the Sunday laws in the majority of instances would probably not be treated as defenses to actions upon bills and notes between immediate parties, they would be still less apt to be allowed in case of a suit by the bona fide holder. In other states, as between immediate parties, the question turns first upon the wording

[203] City Bank v. Barnard, 1 Hall, 80; Gould v. Armstrong, 2 Hall, 265; Hill v. Northrup, 4 Thomp. & C. 120; Grimes v. Hillenbrand, 6 Thomp. & C. 620.

[204] Saltmarsh v. Tuthill, 13 Ala. 390; Vinton v. Peck, 14 Mich. 287.

[205] Cazet v. Field, 9 Gray, 329; Norris v. Langley, 19 N. H. 423; Pindar v. Barlow, 31 Vt. 529.

[206] Laws 1886, c. 593.

[207] Boynton v. Page, 13 Wend. 425; Sayles v. Smith, 12 Wend. 57.

[208] Smith v. Wilcox, 24 N. Y. 354.

[209] Merritt v. Earle, 31 Barb. 38, affirmed 29 N. Y. 115; Batsford v. Every, 44 Barb. 620; McNamee v. McNamee, 9 N. Y. St. Rep. 720; Sun Printing & Pub. Ass'n v. Tribune Ass'n, 44 N. Y. Super. Ct. 136.

and interpretation of the statute itself. If the statute expressly prohibits the making of contracts on Sunday, then it is a defense as between immediate parties. Again, if it provides that no person shall do any work, labor, or business on Sunday, then the making of a bill or note is the making of a contract, is secular business within the meaning of the statute, and is a defense between immediate parties. But if it prohibits only servile work, or the work, labor, or business of a person's ordinary calling, then the making of a bill or note is not within the prohibition of the statute, and the statute does not apply.[210] Where, however, it is conceded that the statute does apply to the case of the bill or note, then the question becomes one of the delivery of the instrument. The bill, note, or indorsement is not executed until delivered.[211] And though dated or signed on Sunday,[212] it has no life as a contract until the day of its delivery. But if dated and signed and delivered on Sunday, or dated and signed on a secular day and delivered on Sunday,[213] the instrument is unenforceable between immediate parties,[214] unless the party prosecuting it shows that it was delivered on a secular day.[215] The presumption from its being dated on Sunday is that it was delivered on that day, and its date is notice to all parties of its delivery on Sunday, and its invalidity.[216] It is this notice which destroys its validity in the hands of the purchaser for value. For if the instrument is dated on Sunday, he is presumed to know it was delivered on that day, and so is a purchaser with notice. But, on the other hand, if the contract was actually made on Sunday, but there is no legal reason for charging the purchaser for value with knowledge of this

[210] Clark, Cont. pp. 394, 395.

[211] See supra, pp. 69, 133.

[212] Conrad v. Kinzie, 105 Ind. 281, 4 N. E. 863.

[213] Allen v. Deming, 14 N. H. 133; Bank of Cumberland v. Mayberry, 48 Me. 198.

[214] Bank of Cumberland v. Mayberry, 48 Me. 198; Pope v. Linn, 50 Me. 86; State Capital Bank v. Thompson, 42 N. H. 370; Ball v. Powers, 62 Ga. 757; Brimhall v. Van Campen, 8 Minn. 13 (Gil. 1).

[215] Drake v. Rogers, 32 Me. 524; Lovejoy v. Whipple, 18 Vt. 379; Aldridge v. Branch Bank, 17 Ala. 45; Trieber v. Commercial Bank, 31 Ark. 128.

[216] Hilton v. Houghton, 35 Me. 143; Winchell v. Carey, 115 Mass. 560; Clough v. Davis, 9 N. H. 500; King v. Fleming, 72 Ill. 21; Cranson v. Goss, 107 Mass. 439; Sinclair v. Baggaley, 4 Mees. & W. 312.

fact, then the illegality of the contract is no defense against the bona fide purchaser, and he takes the bill or note free from equities.[217] Or in other words, to apply the tests given, the Sunday laws are in general of that class which render the consideration illegal, not void, and are therefore not a defense against the purchaser for value, unless he has notice that the bill or note was given in violation of the statute. These tests apply and reasons govern in the application of the statutes which render the bill or note unenforceable, or which seek to regulate the conduct of a business or profession. Examples are the traffic in intoxicating liquors,[218] or statutes requiring lawyers, physicians, and surgeons to procure a license, certificate, or diploma as a condition precedent to the right to practice in their profession, or statutes regulating dealings in articles of commerce. These statutes are in general not a defense to negotiable instruments prosecuted by the bona fide holder.

Common-Law Prohibition.

Evil or immoral considerations affecting negotiable instruments are those which are made in breach of the well-settled rules of the common law. Bills and notes based upon them are either instruments given in consideration of committing a crime or a civil wrong, or else instruments given upon a consideration in fraud of the rights of third persons. Instances of the first kind are orders or promises in consideration of committing a trespass likely to lead to a breach of the peace, as an assault upon a third person,[219] or of printing a libel,[220] or of commiting a civil wrong by fraud or false pretenses.[221] Wherever such are the considerations of a negotiable instrument, the court will refuse to enforce the instrument, as between immediate parties. The agreements based upon a consideration in fraud

[217] Pope v. Linn, 50 Me. 84; State Capital Bank v. Thompson, 42 N. H. 370; Cranson v. Goss, 107 Mass. 439; Greathead v. Walton, 40 Conn. 226; Ball v. Powers, 62 Ga. 757; Trieber v. Commercial Bank, 31 Ark. 128; Clinton Nat. Bank v. Graves, 48 Iowa, 228; Knox v. Clifford, 38 Wis. 651.

[218] Cazet v. Field, 9 Gray, 329; Norris v. Langley, 19 N. H. 423; Pindar v. Barlow, 31 Vt. 529.

[219] Allen v. Rescous, 2 Lev. 174.

[220] Poplett v. Stockdale, 1 Ryan & M. 337; Arnold v. Clifford, 2 Sumn. 238, Fed. Cas. No. 555; Atkins v. Johnson, 43 Vt. 78.

[221] Materne v. Horwitz, 101 N. Y. 470, 5 N. E. 331; Bloss v. Bloomer, 23 Barb. 604; Jerome v. Bigelow, 66 Ill. 452.

of the rights of third persons most common in the case of negotiable instruments are when one creditor takes a bill or note for some advantage to himself over other creditors who have united with him in a composition of their debts against some common debtor.[222] In such a case each creditor acted on the faith that the engagement made with the others would be binding upon them, and each had the undertaking of the rest as a consideration for his own undertaking. The beneficial consideration to each creditor was the engagement of the rest to forbear. "Every composition deed," says Mr. Justice Duer,[223] "is in its spirit, if not in its terms, an agreement between the creditors themselves, as well as between them and the debtor. It is an agreement that each shall receive the sum of the security which the deed stipulates to be paid and given, and nothing more." A private agreement, evidenced by a bill or note, therefore, by any one creditor, to receive more than his composite share, is a fraud upon the rest, and the courts will not enforce it.[224]

Contravention of Public Policy.

The commonest cases of bills and notes given in contravention of public policy are those based upon considerations tending either to injure the public service, or obstruct the public justice, or else based upon considerations in restraint of trade.

"All contracts or agreements," says Comyn, "which have for their object anything against the general policy of the common law are void." [225] This general principle is particularly applied to contracts which have for their object the perversion of the operations of the government.[226] Every citizen owes to his government and all its officers, while executing their official duties, truth and fidelity. All the actions of the government and its officers are based upon certain facts assumed or proved, and falsehoods with reference to those facts are moral wrongs, injurious to the whole state whose government it is, and therefore against public policy. Thus, a note given for forbearing to make a bid on a government mail contract,[227] or a note

[222] White v. Kuntz, 107 N. Y. 518, 14 N. E. 423.
[223] Breck v. Cole, 4 Sandf. 79–83.
[224] Bliss v. Matteson, 45 N. Y. 22.
[225] 1 Com. Cont. 301; Fonbl. Eq. bk. 1, c. 4, § 4.
[226] Gray v. Hook, 4 N. Y. 449.
[227] Gulick v. Ward, 10 N. J. Law, 87.

given to procure the passage of a legislative act by sinister means, is void.[228] It is public policy for the courts to put the stamp of their disapprobation on every act, and pronounce void every contract, the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is committed. These are also the reasons of the common-law rules with reference to considerations touching the administration of public justice.[229] The public welfare requires that crimes, for example, should be investigated and punished, and it is the duty of a citizen paramount to all others to give every assistance to this end.[230] Every instrument given in pursuance of an agreement to obstruct justice as between immediate parties is void. Therefore a note given to stop an intended prosecution for felony and not to appear as a witness before the grand jury, and to dismiss an action for assault and battery,[231] or a note given upon a consideration not to prosecute the maker's son for forgery,[232] is illegal, and cannot be enforced. Agreements based upon a consideration in restraint of trade are held against public policy because they deprive the public of the services of men in the spheres in which they are likely to be most useful, and expose the community to the evils of monopoly. At least such, according to the text writers, was the doctrine of the early common law. The cases were classified into three divisions, and the rules pertaining to them were as follows: (1) When the contract was unlimited in time and space and in total restraint of trade, it was void. (2) When the restraint was limited as to space, but unlimited as to time, it was valid. (3) When the contract was unlimited as to space, but limited as to time, it was void. And these were the tests applied in determining whether bills and notes were void or valid as between immediate parties in cases when the de-

[228] Mills v. Mills, 40 N. Y. 543; Lyon v. Mitchell, 36 N. Y. 235; Fuller v. Dame, 18 Pick. 479; Sedgwick v. Stanton, 14 N. Y. 289; Frost v. Inhabitants of Belmont, 6 Allen, 159; Tool Co. v. Norris, 2 Wall. 45; Marshall v. Baltimore & O. R. Co., 16 How. 314.

[229] Henderson v. Palmer, 71 Ill. 579; Roll v. Raguet, 4 Ohio, 400, 418; Gorham v. Keyes, 137 Mass. 583; Harris v. Brisco, 17 Q. B. Div. 504.

[230] Haynes v. Rudd, 83 N. Y. 251. See, also, Id., 102 N. Y. 372, 7 N. E. 287.

[231] Gardner v. Maxey, 9 B. Mon. 90.

[232] National Bank of Oxford v. Kirk, 90 Pa. St. 49.

fense that the consideration was in restraint of trade was interposed. So coal combinations are in restraint of trade, and a check given for a balance due on such a combination agreement is illegal.[233] And so a bill or note given to further the objects of an association for the regulation of freight and passage rates on the Erie canal is illegal.[234] In these cases it is obvious that such contracts are public in their nature and against the public welfare. With them the reason for the application of the general rule is clear. But when the consideration involves a transaction between private individuals, the early doctrines of the common law are not those at present accepted by the courts. Thus instruments based upon a consideration in partial restraint of trade between individuals are undoubtedly allowed, the distinguishing point being that the restriction must not go beyond what is reasonable to protect the favored party, regard being had to the nature of the business and the interests of the public.[235] And it is worthy of remark that the tendency of recent decisions is to relax even further the rigor of the doctrine that all contracts in general restraint of trade are void. In England[236] it is denied that such has, in fact, ever been the law, and that such a rule is the true public policy is doubted. "If," said Sir George Jessel,[237] "there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held good, and shall be enforced by courts of justice. The theory that such contracts create monopolies is also to be questioned. Competition is not stifled. The business is open to all other persons. And it seems a sounder legal theory to say that a party may legally purchase the trade and business of another for the very purpose of preventing competition. The va-

[233] Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173.

[234] Stanton v. Allen, 5 Denio, 434.

[235] Mitchel v. Reynolds, 1 P. Wms. 181. See cases chronologically arranged in 2 Pars. Cont. p. 748, note; Nobles v. Bates, 7 Cow. 307; Chappel v. Brockway, 21 Wend. 157; Dunlop v. Gregory, 10 N. Y. 241; Alger v. Thacher, 19 Pick. 51; Arnot v. Pittston & E. Coal Co., 68 N. Y. 558.

[236] Rousillon v. Rousillon, 14 Ch. Div. 351.

[237] Printing & Numerical Registering Co. v. Sampson, 19 Eq. Cas. 462.

lidity of the contract, if supported by a consideration, will depend upon the reasonableness between the parties.[288]

Effect of Illegality.

Such are the most important classifications of the very large number of cases involving bills and notes given upon considerations in violation of statutes, of rules of common law, and in contravention of public policy. It remains to speak of the effect of the illegality of considerations being total or partial, of the illegality being known to all the parties, and the rule governing illegal or immoral considerations, and those in contravention of public policy, when used as defenses to actions brought by a purchaser of the instrument for value and without notice.

Same—Illegality as being Total or Partial.

Partial illegality of consideration is to be distinguished from partial lack or failure of consideration, in that illegality, whether it goes to the whole consideration or only part thereof, avoids the whole bill or note. If any part of a contract is void for illegality, all of it is void. The courts will not unravel and separate considerations which are good and considerations which are illegal, and allow recovery for those which are good. In this, illegal considerations which avoid the instrument differ from instruments which cannot be enforced because of partial lack or failure of consideration, the latter being, as has already been said, good pro tanto. And this is so because it is impossible to say whether the legal or illegal portion of the consideration most affected the mind of the maker or acceptor in making his promise. The law will not permit him thus to seek to evade its provisions and yet stand upon and recover for the valid part of the original consideration. Negotiable instruments are not contracts consisting of several parts based on several transactions. They are not of the kind called in ordinary contract law "severable." As to them the general rule of contracts that, where the promises and considerations are severable, an illegal consideration is a partial defense, does not apply. But on the contrary, the undoubted rule is

[288] Whittaker v. Howe, 3 Beav. 383; Jones v. Lees, 1 Hurl. & N. 189; Leather Cloth Co. v. Lorsont, 9 Eq. Cas. 345; Collins v. Locke, 4 App. Cas. 674; Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64; Morse Twist Drill & Mach. Co. v. Morse, 103 Mass. 73; Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419; Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. 363.

that any of the foregoing kinds of illegal considerations, whether total or partial, are defenses to the recovery upon any part of the instrument between immediate parties.

Same—Knowledge of Consideration—Intention.

It must be admitted that comparatively few cases directly involving bills and notes are to be found in examining the question of the knowledge of a party of the illegality of a consideration. But there seems to be no reason why the well-settled rules of contract should not be applied to the case of immediate parties to negotiable instruments. The combinations of circumstances to which these rules of contract apply are where the consideration consists of some illegal act, which it is the mutual intention of the parties to perform; where it consists of some act legal in itself, but mutually intended to further some illegal purpose; where one party intends an illegal act, but the other is innocent of any knowledge concerning it; and, lastly, where one party intends an illegal act and the other party knows of it, but is innocent of any participation in it. In the case of the consideration consisting of some illegal act in which both of the parties participate, courts will not enforce the instrument, because courts cannot enforce a violation of law.[239] This rule is broad enough to cover the case of a legal consideration intended to further an illegal intent, because the parties may not use a legal act to cover a wrong, provided that their intention to commit a wrong was mutual,[240] and the loan of money evidenced by the bill or note was in furtherance of the parties' unlawful purpose.[241] But, on the other hand, if the contract was innocent in itself, and if the party enforcing the bill or note was ignorant of the illegal intention of the other party, he is entitled to its full benefits,[242] and the courts will not shield the other party, because he alone has attempted to further some illegal purpose of his own. But the purpose and consideration of the instrument must be innocent and legal, for if illegal, although

[239] McKinnell v. Robinson, 3 Mees. & W. 434; Cutler v. Welch, 43 N. H. 497; Mordecai v. Dawkins, 9 Rich. Law, 262.

[240] Blont v. Proctor, 5 Blackf. 265; Cannan v. Bryce, 3 Barn. & Ald. 179.

[241] Ernst v. Crosby, 140 N. Y. 364, 35 N. E. 603; Tyler v. Carlisle, 79 Me. 210, 9 Atl. 356; Ruckman v. Bryan, 3 Denio, 340; Cutler v. Welch, 43 N. H. 497; Wright v. Crabbs, 78 Ind. 487.

[242] Pixley v. Boynton, 79 Ill. 351; Quirk v. Thomas, 6 Mich. 76.

its illegality was unknown to the prosecuting party, it is unenforceable, for the courts, from their very constitution, cannot enforce negotiable instruments upon an illegal consideration, and the ignorance of the party himself of the fact that that consideration was in violation of the law does not excuse him.[243] Where, however, the instrument is founded upon a consideration legal in itself, but intended by one party to further an illegal purpose, and the other party knows of it, but takes no part in this illegal purpose, the law is much more difficult of interpretation. It is the opinion of writers[244] and courts[245] of great authority that no recovery can be had by a party whose rights are thus tainted with his knowledge of its illegal purpose. But with all deference to the opinions of such distinguished jurists it is submitted that they are not founded upon the better reason. This would seem to be that as long as the transaction is a fair and honest one between the two parties before the court, and one which they had a perfect right to enter into, the subsequent illegal acts of one of them should not invalidate the contract, as to the other, although that other knew of them, unless he, too, directly or indirectly, participated in them. Wrongful intent is not punishable by law when nothing is done to carry that intent into effect, and much less bare knowledge of such an intent, without any participation in it. The subsequent acts of the other party are something with which he has no concern.[246] And the true rule would seem to be that unless there was evidence of some act of the party prosecuting the instrument showing that he was a particeps criminis to the illegal acts of the other, the bare knowledge of the holder of the other's intention to perpetrate some illegal act would not be a defense to the instrument as against him.

Same—As against Bona Fide Holder.

A consideration illegal because it is evil or immoral or against public policy is not a ground of defense to an action brought by a

[243] Pol. Cont. 322; Anson, Cont. 192; Favor v. Philbrick, 7 N. H. 326.

[244] Daniel, Neg. Inst. § 200.

[245] Hubbell v. Flint, 13 Gray, 277; Hanauer v. Doane, 12 Wall. 342; Tatum v. Kelley, 25 Ark. 209.

[246] Kreiss v. Seligman, 8 Barb. 439; Tracy v. Talmage, 14 N. Y. 162; Falkney v. Reynous, 4 Burrows, 2069; Holman v. Johnson, Cowp. 341; Pellecat v. Angell, 2 Cromp., M. & R. 311.

purchaser of the instrument for value and without notice. The reasons we have already given in this section as those which have governed courts in dealing with considerations made illegal by statute prevail in these cases also. It is therefore needless to repeat them.[248]

118. DISCHARGE OF THE INSTRUMENT AND OF THE PARTIES THERETO—A negotiable instrument may be discharged either by its payment or by operation of law or agreement of the parties. The contract of the drawer or indorser may be discharged by any act of the holder which impairs his rights against other parties liable to him upon the instrument.

119. Payment of an instrument is not a defense to an action brought by its bona fide holder unless made by the acceptor or maker to the legal holder at or after maturity.

120. The rules regulating the title to an instrument of its purchaser for value without notice do not usually apply to discharges of the instrument by operation of law or by agreement of the parties.

121. Where the holder of a negotiable instrument does any act which will impair any right of the drawer or of any indorser against other parties to the instrument liable to him, it operates as a discharge of the obligation of the drawer or indorser. This does not apply if, subsequent to such discharge, a purchaser for value without notice before maturity acquires the instrument.

"Discharge" of an instrument means that all rights of action upon it are extinguished. It is usually effected either by payment, operation of law or agreement of the parties, or, in case of indorsement,

[248] Tied. Com. Paper, § 178; Rand. Com. Paper, § 1887; Daniel, Neg. Inst. § 198; Edw. Bills & N. § 516.

by some act of the holder impairing the rights of the indorser against parties liable to him. The instrument, when the discharge is operative, is no longer negotiable, and even when transferred to a purchaser for value cannot be enforced, because it is itself merely a right to demand money, which, upon the instrument's being discharged, no longer exists. In the classification and rules hereinafter set forth, it is sought, in the first place, to show when payment is operative as a discharge against all parties, and when a mere defense over which the equities of the bona fide holder prevail, and then to mention briefly the various other kinds of discharges, glancing at their principal characteristics.

Payment.

Payment is the first and most common method of discharge. The subject of payment as a discharge is classified as follows:

(a) Money given for the instrument may be either for its payment or its purchase. If for its payment, it discharges it; if for its purchase, it transfers it, leaving the instrument valid.

(b) A full payment at or after maturity upon a bill by the acceptor or upon a note by the maker is presumed to be a discharge of it. Such a payment by an indorser thereon or by the drawer thereof is presumed to be a discharge of his own and subsequent parties' rights and liabilities, but a purchase as to prior parties.

(c) Payment of the instrument may be made by any of its parties to the legal holder thereof or to any person authorized by him to receive the same.[249]

(d) Payment must be made at or after the maturity of the instrument to discharge it as to the purchaser for value without notice.

The best test to determine whether money given for an instrument is given for its payment or for its purchase is the mutual intention of the parties, expressed by their words or acts at the time of the transaction. These, if undisputed, are a final test of the character of the transaction, but, if disputed or doubtful, their meaning and determination become facts for the jury to decide before the court

[249] In Wheeler v. Guild, 20 Pick. (Mass.) 545, the rule was laid down that where at maturity one who is liable on a note pays it to a party who has the legal title thereto, by indorsement and possession, and without notice on the part of the payor that there is a defect in the holder's title, the payment is good.

can declare whether the instrument is discharged or not.[250] If the transaction consists merely of the surrender of the instrument upon the payment of a sum of money equaling the amount due, the first presumption to be attached to the transaction alone is that it is a payment. The reason for this is that a purchase and sale is a contract to be created by overt acts or words manifesting the mutual intention of the parties to buy and sell, while a payment is not a contract resting upon mutual agreement, but is a discharge of a contract. Hence, there being no agreement, the transaction, standing by itself, cannot be treated as a contract, but, to have significance, must be deemed an extinguishment of the instrument.[251] The courts, in construing the relations of the parties created by such a transaction, do not take into consideration only the fact of the presence or absence of an express agreement. They also consider the rights and obligations of the parties upon the instrument itself. The presumption to be drawn from the acceptance upon the instrument is that the acceptor has funds of the drawer wherewith to pay the bill when due, and its payment at or after maturity by the acceptor would be merely the execution of such agency, which would annul any obligations or rights of the holder against the drawer whose funds presumptively are used to pay the bill, or against the indorsers who guaranty that the acceptor or drawer will pay it.[252] Payment by a maker or a co-maker has a similar effect. Such person is primarily liable for the whole of the note, and his intention on giving money for it at or after its maturity must be deemed in law to be, to meet his obligation, and protect those who, as indorsers, have assured purchasers of the paper of its payment.[253] The drawer and indorsers stand upon a different footing. They each are liable to

[250] Kyne v. Erskine, 7 Mo. App. 591; Dougherty v. Deeney, 45 Iowa, 443; Swope v. Leffingwell, 72 Mo. 348.

[251] Lancey v. Clark, 64 N. Y. 209; Burr v. Smith, 21 Barb. 262; Eastman v. Plumer, 32 N. H. 238; Greening v. Patten, 51 Wis. 150, 8 N. W. 107.

[252] Suydam v. Westfall, 2 Denio, 205; Gordon v. Wansey, 21 Cal. 77; Gardner v. Maynard, 7 Allen, 456. On this, see Swope v. Ross, 40 Pa. St. 186, which holds that, since the acceptor of a bill is really the debtor, the drawer and indorser being merely sureties, the debt is extinguished by its payment by the acceptor; and, save where the acceptance was supra protest, no right of action remains against such drawer or indorser.

[253] Ballard v. Greenbush, 24 Me. 336; Beaumont v. Greathead, 2 C. B. 494.

subsequent parties, but prior parties are liable to them. Their payment, therefore, must be deemed to extinguish their own liability, and with it both the successive liabilities of all subsequent parties to each other and also their right against the party paying. This legal result of their act they may be presumed to have intended by the payment of the instrument, but nothing more. It cannot be supposed to have meant to release prior parties, from whom the payor in turn could collect the instrument, or, in other words, to satisfy and discharge the instrument itself. Hence the rule is that money given for an instrument by a drawer or an indorser does not discharge the instrument, but constitutes him the legal holder of it.[254] Thus as to prior parties it is a transfer, and not a discharge. And in considering the transactions of the various parties to the instrument the rule to note is that payment of the instrument, to operate as a discharge, must be intended as a payment, and must be made by the acceptor or maker at or after maturity, otherwise it is presumptively a transfer. From these reasons naturally follows the rule that any of the parties to the instrument may make payment and thus extinguish their own obligations.[255]

It is well, perhaps, to append to this statement a few scattered principles usually added by the text writers to their remarks upon this branch of the subject. It is advisable for any party making payment to assure himself that there has been due presentment, protest, and notice, because in default of these he could not recover against the antecedent indorsers or the drawer under liability to him. It is also advisable for him to look to the identity of the holder, and that he traces a legal title to the instrument. And lastly that he take the instrument itself into his possession, because that is prima facie evidence of payment, and also that he strengthen this evidence by taking a separate voucher as a receipt.[256] This last

[254] As to indorser, West Boston Sav. Bank v. Thompson, 124 Mass. 506; Howe Mach. Co. v. Hadden, 8 Biss. 208, Fed. Cas. No. 6,785; Hayling v. Mullhall, 2 W. Bl. 1235; Morgan v. Reintzel, 7 Cranch, 273. As to drawer, Callow v. Lawrence, 3 Maule & S. 95; Benj. Chalm. art. 234; Story, Bills, § 422; Rand. Com. Paper, § 427.

[255] Tied. Com. Paper, § 372; Daniel, Neg. Inst. § 223; Edw. Neg. Inst. §§ 721–729; Rand. Com. Paper, c. 39, § 2.

[256] Daniel, Neg. Inst. c. 38, § 2; Tied. Com. Paper, c. 19, §§ 372, 373.

course is especially desirable in case of an indorser making payment, because, in his action against prior parties, possession of the instrument is in some cases not sufficient evidence of its payment by him, and it is necessary for him to show the fact of payment by himself affirmatively. For this purpose a receipt, while not conclusive, is yet very strong proof.[257] The person to whom payment must be made is the legal holder or his duly-authorized agent. This legal ownership depends upon two principles. If the instrument is payable to bearer or indorsed in blank, its possession is presumptive evidence of right to collect it.[258] But if it is made payable to order or indorsed to order, the order of the payee is necessary to confer title and right to collect, and mere possession is not presumptive evidence of title.[259] In such cases, where it is lawfully in the holder's possession, there must be shown, in addition, some evidence of agency or legal right to receive the money, as that the holder is the assignee of a bankrupt, or the representative of the dead owner, or the guardian of an infant.[260] The reasons for these several positions have already been given.

These general principles lead to an understanding of the comparative rights of the party paying the instrument and those of the bona fide holder, when weighed with each other. On the one hand, the former has paid the instrument once, and has a right to say that he has performed his promise and satisfied his obligations; on the other, the bona fide holder, if he has received it before it is due, has taken the paper with nothing to awaken his suspicion concerning it, and, from the terms of the instrument, is warranted in supposing that the acceptor or maker will pay the instrument when due, because he has promised to do so. It is the acceptor or maker who fails in the performance of the letter of his contract, and not the bona fide holder. And therefore the equity of the bona fide

[257] Mendez v. Carreroon, 1 Ld. Raym. 742.

[258] Mauran v. Lamb, 7 Cow. 174; Merritt v. Cole, 14 Hun, 324; Bachellor v. Priest, 12 Pick. 406; Bank of U. S. v. U. S., 2 How. 711.

[259] Doubleday v. Kress, 50 N. Y. 410; Porter v. Cushman, 19 Ill. 572; Pease v. Warren, 29 Mich. 9.

[260] Bayley, Bills (2d Am. Ed.) 320; 2 Pars. Notes & B. 211; Daniel, Neg. Inst. § 1230; Tied. Com. Paper, § 374.

holder is superior to that of the party making the payment.[262] The payment on the part of the payor might be looked on by the purchaser as a discount,—a proceeding in which the bona fide holder has no interest, and concerning which, before maturity, he is not bound to inquire. If the holder at the time of payment consented to receive payment, the payor should either have demanded the return of the instrument to which he was entitled, or else should have insisted upon its destruction, or the writing upon it of some memorandum showing unequivocally that it was canceled.[263] And if he failed to assert his legal rights, or to take proper precautions, he, and not the bona fide holder, should suffer. Where a payment upon the instrument is made to one not the legal holder, a parallel course of reasoning is followed.[264] Such a payment is made to one who had no legal right to receive it. It is therefore no discharge of the obligation. The payor has made a mistake in law, and his mistake and ignorance of the law can be no excuse to him. And lastly, if the drawer or indorser makes the payment before maturity, it is not an extinguishment of the instrument at all. It can be at most merely a satisfaction of his individual liability upon it, and that of parties subsequent to him. It is well settled, moreover, that an indorser may take up and reissue a bill or note with or without his indorsement,[265] as may also a drawer, except in cases of an ac-

[262] Burbridge v. Manners, 3 Camp. 193. It was held in this case that, although a bill cannot be reissued after it has arrived at maturity and been paid, yet if paid, and afterwards indorsed before it becomes due, it is a valid security in the hands of a bona fide indorsee. In the case of Morley v. Culverwell, 7 Mees. & W. 174, it was shown that the drawer of a bill of exchange, before it became due, agreed with the acceptor that, on his giving a certain mortgage security for the amount, he, the drawer, accordingly executed the mortgage and received back the bill uncanceled. It was held that the drawer was liable on the bill to a party to whom the acceptor afterwards paid it for value before it came due. A plea that the bill was paid by the acceptor before it came due, and afterwards reissued by him without a new stamp, can be supported only by proof of actual payment in cash, and not by evidence of an arrangement between the drawer and acceptor, whereby the bill was treated as being satisfied.

[263] District of Columbia v. Cornell, 130 U. S. 659, 9 Sup. Ct. 694.

[264] Harpending v. Gray, 76 Hun, 351, 27 N. Y. Supp. 762.

[265] St. John v. Roberts, 31 N. Y. 441; French v. Jarvis, 29 Conn. 348; Kirksey v. Bates, 1 Ala. 303.

ceptance for his own accommodation, or of his liability to an indorser.[266] In case of such payment and reissue before maturity, the bona fide holder, upon acquiring the instrument, may well rely upon this settled rule of law in defending his title to the instrument. And so far as he is concerned, it is a just and wise rule that payment of an instrument is inoperative as a defense except when made by the acceptor or maker to the legal holder at or after maturity. If a person acquires title to an unpaid instrument after maturity from the holder, or if he acquires it before maturity from a person other than the holder, or his agent, he is by virtue of these facts put upon notice, and not a bona fide holder.[267] If he acquires the instrument from the drawer or indorser after maturity, he becomes a party to a new contract, not based upon the instrument, but one by which the vendor agrees to pay to him the amount of the instrument if it be not paid by the maker or acceptor within a reasonable time.[268] But in such a transfer also the holder buys only the rights of his transferrer, and is not strictly a bona fide holder.[269] It is only when his transferrer is a bona fide holder, and can convey a title free from equities, that his successor steps into his rights by virtue of the assignment.

[266] Callow v. Lawrence, 3 Maule & S. 95. In this case, the drawer of a bill payable to his own order, and indorsed by him to T., and by T. to B., upon the bill being dishonored, paid the amount to B., who struck out his own and T.'s indorsement, and returned it to the drawer, and the drawer afterwards passed it to the plaintiff. It was held that the plaintiff might recover against the acceptor.

[267] See supra, pp. 199–205. Where one is an indorsee for value of a bill before its maturity, and not knowing that it is accommodation paper, he may treat all parties thereto as liable in their turn, and no subsequent knowledge that the bill is for accommodation will alter this right. If the holder release the drawer, the ultimate liability of the acceptor is not thereby affected. Farmers' & M. Bank v. Rathbone, 26 Vt. 19.

[268] Leavitt v. Putnam, 1 Sandf. 199; Brown v. Davies, 3 Term R. 80. It was held in this case that where a promissory note has been indorsed to the plaintiff after it became due, who sues the maker upon it, the latter is entitled to go into evidence to show that the note was paid as between him and the original payee. "Generally, when a note is due, the party receiving it takes it on the credit of the person who gives it to him" (per Butler, J.).

[269] See supra, pp. 199–205.

By Operation of Law or Agreement of the Parties.

The two remaining classes to be briefly mentioned are discharges by operation of law and discharges by agreement of the parties. Of the former class, the instances cited by the authorities are where, by some insolvent act of the state or country, the party is discharged from his obligation, where the instrument is merged in the higher form of contract of a judgment taken upon it, where the holder of the instrument makes a bequest or gift of it to the acceptor or maker, and, in states or countries where the common-law rule prevails, when the holder appoints the acceptor or maker his executor, though this common-law rule is very generally abolished by statute. Of the latter class, the instances cited are an accord and satisfaction, a general release from the holder to the maker or acceptor, and lastly an agreement between the holder and the acceptor or maker either that another shall be substituted as the debtor upon the instrument, or that another security or a higher security shall be taken in lieu of the bill or note.[270] It will be seen in all of these instances, except those where the rights are destroyed by statute, that the holder voluntarily surrenders his rights. If the instrument is subsequently acquired before maturity by a purchaser for value, these discharges do not alter his rights. But if the instrument remain the property of the holder the questions of the comparative rights of the holder and those of the other parties are eliminated from consideration. The questions involved become those of ordinary contract law, and not of the special form of contract of the negotiable instruments. Suffice it to say, therefore, that discharges by operation of law and by agreement of the parties are not defenses to the action on the instrument, if again transferred, but if the instrument remains with the holder they are defenses, because, by the

[270] The holder of bills accepted for accommodation of B., the drawer, after they became due, entered into an agreement with B. that, in consideration of B. giving him a freehold mortgage for these bills and other debts, he would deliver up the bills to be canceled, and give up his claim on all parties. The mortgage security was given accordingly. At the time of the agreement the holder knew that the acceptances were accommodation acceptances. In an action by the holder against the acceptor, it was held that the acceptor was discharged, and had a defense on equitable grounds. Ewin v. Lancaster, 6 Best & S. 571.

rules of ordinary contracts, the holder has himself surrendered his right to the party whom he is prosecuting.

Discharge of Drawer and Indorsers as Sureties.

In addition to the methods of discharge extinguishing the instrument itself as an obligation must be mentioned the methods of discharge extinguishing the several contracts of the drawer and indorsers in their character of a surety thereupon by operation of the general rule of suretyship applied to the law of negotiable bills and notes. The principle underlying this method is that if the holder of a bill or note does any act which will impair any right of the drawer or indorsers against other parties to the instrument liable to him, the drawer or indorser will be discharged. The reason for this rule is the promise implied in law, that, if either the drawer or indorser pays the instrument, parties liable to him will reimburse him for such payment, and that to effect such end upon payment the drawer or indorser is entitled to demand its possession from the creditor, and to be subrogated to all remedies possessed by him against the prior parties thereon, unimpaired by any act of such creditor,—a promise which the creditor also impliedly ratifies in making his contract with the indorser.[271] If the creditor violates any part of this contract, this violation releases the indorser. From this principle flow several principles which are of very common application. They are as follows:

(1) Whatever discharges the acceptor or maker discharges the drawer or indorsers, because the ultimate remedies of the drawer or indorsers are against these parties, and releasing them extinguishes the obligation which in turn they, as sureties, undertook should be performed.[272]

(2) Any act of the holder which discharges a prior indorser discharges subsequent ones, because such prior indorser guarantied subsequent indorsers that he would pay if the maker or acceptor did not. As far as they were concerned, he stood in the position of a principal upon the contract, and the release of their principal

[271] Shutts v. Fingar, 100 N. Y. 539, 3 N. E. 588; Goodyear v. Watson, 14 Barb. 481; Clason v. Morris, 10 Johns. 524.

[272] Sargent v. Appleton, 6 Mass. 85; Couch v. Waring, 9 Conn. 261; Gunnis v. Weigley, 114 Pa. St. 194, 6 Atl. 465.

also releases them. A discharge of a prior indorser therefore is like a discharge of the maker or acceptor, and the holder violates this contract with them.[273]

(3) If the holder releases securities held by him as collateral to claims against parties against whom the indorser would have recourse, it releases the indorser. This is because the surety, upon payment of the claim against his principal, has a right to be put in the place of the creditor. He has a right to enforce every means of payment against the principal debtor the creditor had. These securities were a means of such enforcement, and he has a right to them. Every remedy the creditor had, upon payment by the surety, belong to him. And if the creditor impairs the rights of the surety in this respect, he breaks his contract with him and releases him.[274]

(4) Where the holder of the instrument upon a valid consideration makes a definite promise to extend the time or forbear suit against a party liable to a drawer or indorser, this discharges the drawer or indorser. The reasons for this rule are that it creates a contract different from the one the surety guarantied, and that it prevents the surety from protecting himself by paying forthwith the principal's debt and immediately bringing suit against him.[275] But it

[273] Newcomb v. Raynor, 21 Wend. 108. In this case it was held by Nelson, C. J., that, "as between the first and subsequent indorsers, the former must be regarded in the light of principal. He stands behind them upon the paper, and is bound to take it up, in case of default of the maker. A discharge of him, therefore, by the holder (regarding the relative position of the parties), on general principles, operates to release them." Shutts v. Fingar, 100 N. Y. 539, 3 N. E. 588.

[274] Goodyear v. Watson, 14 Barb. 481; Clason v. Morris, 10 Johns. 539; Craythorne v. Swinburne, 14 Ves. 169; Mathews v. Aikin, 1 N. Y. 595.

[275] Siebeneck v. Anchor Sav. Bank, 111 Pa. St. 187, 2 Atl. 485; Batavian Bank v. McDonald, 77 Wis. 486, 46 N. W. 902; Stevens v. Oaks, 58 Mich. 343, 25 N. W. 309. In the case of Okie v. Spencer, 2 Whart. 253, the holder of a note took a check from the maker, dated six days subsequent to the maturity of the note, and with the understanding that the check was to be in full satisfaction of such note, if paid. It was held that this constituted an extension to the maker, and discharged an indorser. In the case of Tiernan v. Woodruff, 5 McLean, 350, Fed. Cas. No. 14,028, a bankrupt obtained for a valuable consideration, from a creditor, two months' time, during which the creditor's right to bring suit was suspended. It was claimed by the indorser that this operated to discharge him from his indorsement, but it was

must be a new contract which is created and substituted for the old one. It must be with the principal himself,[276] and must have a valid consideration.[277] It must be absolute,[278] and not indefinite.[279] And it must have all other requisites necessary to create

held that since, by the bankrupt law, the bankrupt was discharged of all liability, and since the sole remedy of the indorser lay in his presentation of his future liability against the bankrupt's estate, his right was not prejudiced by the extension of time, and there was no discharge. In Laxton v. Peat, 2 Camp. 185, it was held that if the indorsee of a bill of exchange, having notice that it was accepted without consideration, receive part payment from the drawer, and give him time to pay the residue, he thereby discharges the acceptor. In the case of Pannell v. M'Mechen, 4 Har. & J. (Md.) 474, "the drawer and indorser of a note, being unable to meet their engagements, proposed to compound with their creditors, and executed a deed of trust to trustees, of whom the defendant was one, to be applied to the payment of debts in the order directed, thereby securing to the defendant the payment of the note in question, on the terms that such creditors as should become parties to the deed should have an interest in the property conveyed. The deed contained a clause releasing the drawer and first indorser, on the express terms that the release should extend to no other terms. The plaintiff and defendant assented, and signed the instrument. * * * Therefore * * * the court are clearly of the opinion that the release in this case cannot discharge the defendant." (Per Johnson, J.) In Callott v. Haigh, 3 Camp. 281, it was held that the drawer of an accommodation bill was not discharged by time being given the acceptor, and in Fentum v. Pocock, 5 Taunt. 192, it was held that, if the holder of a bill accepted for the accommodation of the drawer takes a cognovit from the drawer for payment by installments, he does not thereby discharge the acceptor, whether the holder knew at the time of taking the bill that it was an accommodation bill or not.

[276] Harbert v. Dumont, 3 Port. (Ind.) 346.

[277] McLemore v. Powell, 12 Wheat. 554. It was held by Justice Story, in this case, that: "The case then resolves itself into this question,—whether a mere agreement with the drawers for a delay, without any consideration for it, and without any communication with, or assent of, the indorser, is a discharge of the latter, after he has been fixed in his responsibility by the refusal of the drawee, and due notice to himself, and we are all of opinion that it does not. * * * In order to produce such a result, the agreement must be one binding in law upon the parties, and have sufficient consideration to support it." Davis v. Graham, 29 Iowa, 514; Galbraith v. Fullerton, 53 Ill. 126.

[278] Hansberger v. Geiger, 3 Grat. 144.

[279] Gardner v. Watson, 13 Ill. 347; Blackstone Bank v. Hill, 10 Pick. 133;

a contract. The surety must not assent to it,[280] and it must be without reservation as to him.[281] It is to be added, by way of caution, that this rule must not be understood to mean mere delay,[282] nor part payment,[283] nor the receipt by the creditor of collateral security to protect his claim.[284] For these in no wise prejudice the surety in his position.

Other Methods of Discharge.

In concluding these rules, it is proper to add there are other methods of discharge which have already been sufficiently examined. They are misrepresentation or fraud in procuring the indorsement, which is governed by the principles of fraud already stated, diversion of the instrument, its alteration, its payment or release. The general rule is that these and the other methods of discharge are not to be understood as being defenses to the action of the purchaser for value without notice unless they are his own act. For the acts of others he is not responsible. Thus, for example, the indorser, as a surety, cannot set up against the bona fide holder the defense of fraud,[285] nor diversion.[286] For the general rule applies to these instances, that any defense not appearing on the face of the paper, and in which he, as holder, has taken no part, would not operate as a defense against him.

Abel v. Alexander, 45 Ind. 523; People's Bank v. Legrand, 103 Pa. St. 309; Beach v. Zimmerman, 106 Ind. 498, 7 N. E. 237.

[280] Gloucester Bank v. Worcester, 10 Pick. 528; Prouty v. Wilson, 123 Mass. 297; Smith v. Hawkins, 6 Conn. 444.

[281] Muir v. Crawford, L. R. 2 H. L. Sc. 456.

[282] Powell v. Waters, 17 Johns. 176; Sterling v. Marietta & S. Trading Co., 11 Serg. & R. 179; Freemans Bank v. Rollins, 13 Me. 202; Sohn v. Morton, 92 Ind. 170.

[283] Greenawalt v. McDowell, 65 Pa. St. 464; Hill v. Bostick, 10 Yerg. 410.

[284] Beard v. Root, 4 Hun, 357; Cary v. White, 52 N. Y. 138; Andrews v. Marrett, 58 Me. 539.

[285] Selser v. Brock, 3 Ohio St. 302; Wayne Agricultural Co. v. Cardwell, 73 Ind. 555.

[286] See supra, p. 173.

SUMMARY OF CHAPTER.

(1) The purchaser for value without notice cannot recover upon the instrument against parties who are infants, nor, in some jurisdictions, against married women, nor against adjudged incompetents, because all these parties had no capacity to make or indorse the instrument itself. Probably also insanity and complete intoxication are still defenses available against the bona fide holder, but ultra vires is not such a defense.

(2) The purchaser for value without notice cannot recover upon the instrument where statutory enactment expressly or impliedly declares the instrument void.

(3) The purchaser for value without notice cannot recover upon the instrument where the instrument as held by him does not upon its face evidence the agreement between the parties.

(4) The purchaser for value without notice can recover upon the instrument and has a title, in the following cases:

Where there is no real intention to issue or indorse the instrument, such as fraud, duress, or diversions.

Where a defense of failure or lack of consideration or illegality of consideration which does not avoid the instrument is interposed.

Where the instrument has been discharged by payment, or some act which is not the personal act of the holder.

CHAPTER VIII.

PURCHASER FOR VALUE WITHOUT NOTICE.

122. What Constitutes.
123–124. Value.
125–127. Notice.
128–131. Presumption and Burden of Proof—Order of Proof.

WHAT CONSTITUTES.

122. To constitute a purchaser of a negotiable instrument a purchaser for value without notice, the purchase must be:

(a) For a valuable consideration.

(b) Without notice of facts which impeach its validity between antecedent parties.

It remains in this chapter to examine consideration and notice, the two other elements of bona fide title yet undiscussed. The purchaser, in order to entitle him to the immunities of negotiability, must be both a holder for value, and also a holder without notice.[1] Both of these factors must concur in his holding. A purchaser for value may or may not be a purchaser without notice. A purchaser without notice irrespective of the rights he may acquire upon transfer, cannot overcome equities if he has paid no value. In the former case it makes little difference that the holder took the instrument and paid its face for it; in the latter, that he took the instrument in the truest faith.[2] Therefore, to the branches of the subject of the purchaser for value without notice already given, we

[1] See the opinion of Holroyd, J., in Smith v. De Witts, 6 Dowl. & R. 120, where he holds that if the bill upon which the action was brought "had been delivered to a bona fide holder for valuable consideration, and a person ignorant of the circumstances under which it had been obtained, he might sue the acceptor, notwithstanding any want of consideration received by him."

[2] Northampton Nat. Bank v. Kidder, 106 N. Y. 221, 12 N. E. 577; Weaver v. Barden, 49 N. Y. 286.

desire to add some discussion of the divisions of these two topics. They are the consideration necessary to make the holder a purchaser for value,[3] and that peculiar phase of the doctrine commonly called the "antecedent" or "pre-existing" indebtedness, and whether it does or does not sustain the position of the bona fide holder;[4] of what notice necessary to make the purchaser one without notice consists; and, lastly, in conclusion, the presumptions of evidence which attach to a negotiable bill or note in the hands of a bona fide holder in its proof upon trials.

VALUE.

123. Value, as a consideration for transfer, means any legal consideration sufficient to support a contract. An antecedent or pre-existing debt probably constitutes value sufficient for a consideration for a negotiable bill or note or the transfer thereof.

124. THE TRANSFER—A bill or note transferred as collateral to an indebtedness is probably transferred for value and upon a sufficient consideration.

[3] "The rule appears to be settled, that a promissory note, to be the subject of sale, must be an existing valid note in the hands of the payee, and given for some actual consideration, so that it can be enforced between the original parties." Noxon, J., in Sweet v. Chapman, 7 Hun (N. Y.) 576. Where a note is discounted by a bank to extinguish a debt which is owed to the bank by the holder, or where it applies the proceeds for the purpose of discharging his liabilities, the acts of the bank amount to the payment of value at the time, and the bank is a holder for valuable consideration. Bank of Sandusky v. Scoville, 24 Wend. (N. Y.) 115. To the same effect, see Bank of Salina v. Babcock, 21 Wend. (N. Y.) 499. In Brown v. Leavitt, 31 N. Y. 113, it was held that where a note is indorsed and delivered to a party, before it falls due, in payment of a note already due, such transaction constitutes the party a holder for value. And see Rice v. Grange (N. Y. App.) 30 N. E. 46, Johns. Cas. Bills & N. 174.

[4] "Bona fide holder," "innocent indorser," "bona fide holder without notice and for value," "purchaser in the usual course of business," "purchaser in due course," "holder in due course," "purchaser without notice," are terms indifferently and synonymously, though loosely, applied to what is in this section termed "the purchaser for value without notice."

The meaning of "value" in the term "purchaser for value" means "either money or money's worth." [5] It may be cash paid out. It may be goods given. It may be rights surrendered. It may be liabilities incurred. Anything which men in business call "property"; anything for which a court, on some one being deprived of it, would award damages; anything, in short, which has an appreciable propertied existence, is value. And the purchaser who gives it in exchange for a bill or note is a purchaser for value, or a purchaser for a valuable consideration.

Antecedent indebtedness means a debt already existing at the time of the execution of a contract, whatever it may be. Such, for example, are a note for which a renewal note is given, or a debt created in buying goods for which, at the expiration of the terms of credit for which the goods were sold, a note is given in extension. The importance of the doctrine relates almost always to the question whether the purchaser of the paper is a holder for value or not. If he is to be treated as a holder for value, then the defenses in favor of prior parties are ruled out; if not, then any prior party may raise such defenses as he has against the person who has taken the instrument without notice, but in consideration of the alleged antecedent indebtedness.

The wisest theory, all things being considered, is the doctrine of Judge Story.[6] He lays down the doctrine that receiving such paper in payment or as security for a pre-existing debt is receiving it for a valuable consideration. "Thus," he says, "it may pass, not only as security for new purchases and advances made upon the transfer thereof, but also in payment of and as security for pre-existing debts. In this way the creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. Otherwise, the discounts, by banks, of negotiable securities, are restricted, and credit and circulation of negotiable paper hampered." This doctrine is followed by the weight of authority throughout the United States. And it certainly seems the sounder business policy to maintain that the transfer of a negotia-

[5] Ames, Bills & N. p. 867.

[6] Swift v. Tyson, 14 Curt. Dec. 166, 16 Pet. 1, Johns. Cas. Bills & N. 179.

ble security both in payment and as security for an antecedent debt is a transfer for value.[7] However, the courts of some jurisdictions, and particularly of the state of New York, have taken issue with the doctrine of Judge Story. The reasoning of these courts is based not so much upon the practical doctrines of commercial convenience as upon the strict logic of the law itself. Their doctrine is that the position of the bona fide holder rests its foundations upon the equitable doctrine that a purchaser who holds the legal title to property merely as security or as the payment of a pre-existing debt, without parting with anything of value, is not entitled to hold as against the prior equitable owner. The two elements of absence of knowledge and value given must concur to make the holder's equity a superior one. And taking the instrument as a mere security or in nominal payment of a pre-existing debt is not giving value for it. Hence, the position of the holder, lacking the element of value given, does not entitle him to overthrow the defenses which other parties may interpose.[8] There must be value given or allowed on his part

[7] Bank of Metropolis v. New England Bank, 1 How. 234; Barney v. Earle, 13 Ala. 106; Brush v. Scribner, 11 Conn. 388; Meadow v. Bird, 22 Ga. 246; Conkling v. Vail, 31 Ill. 166; McKnight v. Knisely, 25 Ind. 336; Homes v. Smyth, 16 Me. 177; Blanchard v. Stevens, 3 Cush. 162; Thacher v. Pray, 113 Mass. 291; Outhwite v. Porter, 13 Mich. 533; Stevenson v. Hyland, 11 Minn. 198 (Gil. 128); Struthers v. Kendall, 41 Pa. St. 214; Dixon v. Dixon, 31 Vt. 450. See, also, Bridgeport Bank v. Welch, 29 Conn. 475; Manning v. McClure, 36 Ill. 490; Washington Bank v. Lewis, 22 Pick. 24; Fisher v. Fisher, 98 Mass. 303; Armour v. McMichael, 36 N. J. Law, 92; Cobb v. Doyle, 7 R. I. 350. In the case of Currie v. Misa, L. R. 10 Exch. 153, it was held that the title of a creditor to a negotiable security given to him on account of a pre-existing debt, and received by him bona fide and without notice of any infirmity of title on the part of the debtor, is indefeasible, whether that security be payable at a future time or on demand. In the case of Francia v. Joseph, 3 Edw. Ch. (N. Y.) 182, it was held that where a note was given to A to get it discounted, and he gives it to B in payment of a pre-existing debt of his own, he who takes the note cannot hold it as against the owner, even though he was ignorant of the manner in which it came into the possession of A, and though the note was received as a consideration for his forbearance.

[8] Stalker v. McDonald, 6 Hill, 93. In this case it was held that where the person receiving the bill has taken it merely in payment or security of an antecedent debt, having neither parted with value on the credit of it nor given up a previous security, he will not be entitled to hold the bill against the former rightful owner, in case of an unauthorized transfer.

on the strength of the identical paper on which the action is brought to make the holder a purchaser for value.[9] The comparative equities of prior parties and the holder turn upon this point. In case of payment the question is whether he has taken the instrument in nominal payment, without other evidence of intention to discharge it than the ordinary business transaction of accepting it, or receipting it in payment, or crediting it on account. In each of these latter cases he stands in the position he held before receipt of the paper, with the added property of the paper in his hands, for which he has neither given nor suffered anything. His right to proceed upon the original indebtedness after the maturity of the paper is unimpaired. And equity will not tolerate his holding the additional paper to the prejudice of those parties who have prior rights or defenses which render his claim a wrongful one. Hence, the rule is established in many states, in contradiction to the wiser theory of Judge Story, that one who receives paper before it is due, without any notice or knowledge of any fraud in its inception or transfer, but for a precedent debt, and without parting with any value or valuable consideration, does not acquire a valid title to the paper, but takes it subject to all its infirmities.[10] The courts who have adopted this position have, however, confined the scope of the rule to narrow limits. If it appears that the holder has in any wise given value for the transfer, his title has been supported. This has given rise to a large number of decisions as to the meaning of value in taking paper, both in payment of and as collateral security for a precedent debt, which may be approximately [11] classified as follows:

(1) Value is given upon transfer when the instrument is transferred

[9] Bay v. Coddington, 5 Johns. Ch. 54, Johns. Cas. Bills & N. 133.

[10] Phoenix Ins. Co. v. Church, 81 N. Y. 218; Comstock v. Hier, 73 N. Y. 269; Turner v. Treadway, 53 N. Y. 650; Weaver v. Barden, 49 N. Y. 286; Lawrence v. Clark, 36 N. Y. 128; Farrington v. Frankford Bank, 24 Barb. 554; Moore v. Ryder, 65 N. Y. 438; Potts v. Mayer, 74 N. Y. 594; Rosa v. Brotherson, 10 Wend. 85; Payne v. Cutler, 13 Wend. 605; Goggerly v. Cuthbert, 2 Bos. & P. (N. R.) 170; Evans v. Kymer, 1 Barn. & Adol. 528; Jones v. Fort, 9 Barn. & C. 764; Wormley v. Lowry, 1 Humph. 468; Ingham v. Vaden, 3 Humph. 51; Rhea v. Allison, 3 Head, 176; Hickerson v. Raiguel, 2 Heisk. 329.

[11] The term "approximately" is used because many of the decisions are apparently irreconcilable.

in satisfaction of a pre-existing debt, whether it is in whole or part payment of the debt,[12] or whether the instrument surrendered has matured, or is not yet due.[13] This is because the creditor, in surrendering his rights under the old debt in exchange for the new paper, parts with value.[14]

(2) Value is given upon transfer when, at the time thereof, security is surrendered by the holder in consideration of the receipt by him of the instrument. Such a holder takes the instrument free from the defenses of antecedent parties, to the extent of the collaterals surrendered.[15]

The situation of the creditor discharging a pre-existing debt or surrendering securities in consideration of the transfer of paper to him, from a legal point of view, is not dissimilar to that of a creditor receiving paper as collateral security for a debt due from the transferror to him. In taking the paper as collateral security, the creditor still retains all his rights upon the original indebtedness. The paper is received by him merely to further assure the certainty of the recovery of his debt. He may or may not recover it in full, and if he does not he may proceed upon his collateral. Therefore, in weighing the comparative equities of such persons and those from whom the paper has been derived through wrong, the turning point is naturally value. This renders the equity superior or inferior according as it has or has not been given. And in determining the question, the cases have been classified as follows:

(1) Where the debt is contracted at the time of transfer and on the faith of the bill or note, or indorsement of a third party as col-

[12] Chrysler v. Renois, 43 N. Y. 209.

[13] Day v. Saunders, 1 Abb. Dec. 495; Youngs v. Lee, 12 N. Y. 551.

[14] Mayer v. Heidelbach, 123 N. Y. 332, 25 N. E. 416; American Exch. Nat. Bank v. New York B. & P. Co., 74 Hun, 446, 26 N. Y. Supp. 822; Ward v. Howard, 88 N. Y. 74; Chrysler v. Renois, 43 N. Y. 209; Brown v. Leavitt, 31 N. Y. 113; Youngs v. Lee, 12 N. Y. 551; Mix v. National Bank of Bloomington, 91 Ill. 20; Bardsley v. Delp, 88 Pa. St. 420; Norton v. Waite, 20 Me. 175; Brush v. Scribner, 11 Conn. 388; Dixon v. Dixon, 31 Vt. 450; Kellogg v. Fancher, 23 Wis. 21; McKnight v. Knisely, 25 Ind. 336; Mayberry v. Morris, 62 Ala. 116.

[15] Goodwin v. Conklin, 85 N. Y. 21; Phoenix Ins. Co. v. Church, 81 N. Y. 218; Park Bank v. Watson, 42 N. Y. 490; Bank of Salina v. Babcock, 21 Wend. 499.

lateral security, that debt itself forms a part of the consideration of the transfer and constitutes value. This is because the holder may be supposed to part with his property upon the faith not only of the principal instrument, but also of the instrument put up as collateral. The two, as elements of the consideration, are inseparable. The courts will not inquire whether the holder parted with value because of the original or because of the collateral paper. They consider such value given for both.[16]

(2) Where the instrument is accommodation paper, that fact is no defense to a holder who receives it as collateral to a pre-existing debt. This is because the delivery of the instrument as collateral is in furtherance of the purpose of the accommodation, which was to obtain credit. The equity of the holder, who so takes it, is therefore superior to that of the accommodation party who gives it.[17] But the reason of this rule ceases to apply, and the rule itself is otherwise, when the instrument has been diverted or procured through fraud.[18]

(3) Where the pre-existing debt has fallen due, and there is a transfer of a bill or note as collateral security with an express agreement for delay. The forbearance is a sufficient consideration. This is because such forbearance is a surrender by the holder of his valuable right of immediate prosecution.[19] But the rule only applies for the reason that the holder, by valid agreement, has estopped himself from prosecuting. If, therefore, the agreement is invalid, and there is no legal reason why the holder should not prosecute, the receipt of the paper is upon a consideration which is worthless in law, and the holder is deemed to have given no value.[20]

(4) In addition to these rules are the principles already discussed, which apply to the position of the holder taking the instrument as

[16] Bank of New York v. Vanderhorst, 32 N. Y. 553; Bank of Chenango v. Hyde, 4 Cow. 567; Williams v. Smith, 2 Hill, 301.

[17] Continental Nat. Bank v. Townsend, 87 N. Y. 8; Grocers' Bank v. Penfield, 69 N. Y. 502; Schepp v. Carpenter, 51 N. Y. 602.

[18] Schepp v. Carpenter, 51 N. Y. 602; Spencer v. Ballou, 18 N. Y. 331; Bank of Rutland v. Buck, 5 Wend. 66.

[19] Mechanics' & F. Bank v. Wixson, 42 N. Y. 438; Traders' Bank v. Bradner, 43 Barb. 379; Burns v. Rowland, 40 Barb. 368; Watson v. Randall, 20 Wend. 201.

[20] Atlantic Nat. Bank of New York v. Franklin, 55 N. Y. 235.

collateral, as well as when he takes it in payment. They are (a) where the note is received in payment of one then surrendered and canceled, or in absolute payment, (b) and where securities are surrendered. The principles upon which the title of the holder of collateral security rests regulate also the amount which may be collected out of it.

The law permits the original holder to transfer to the vendee such a right to recover upon the paper as is required to indemnify him from loss. But it does not permit the purchaser to make a speculation out of the paper. Courts of equity, from which the legal rules affecting commercial paper in this respect are derived, do not extend their protection in favor of the purchaser beyond that limit. The holder, except so far as he has parted with value, has no equity superior to the person who has the defense; and therefore it is that the holder, taking paper as collateral, can only recover upon it to the amount of the loss which he suffers upon the original paper; that is to say, the amount for which the paper is itself put up as collateral.[21] If the principal paper is entirely worthless, and in amount equal or in excess of the paper put up as collateral, then he may recover the entire amount of the collateral; but otherwise, it is only what he loses on the principal paper which can measure his damages.[22]

[21] Where a promissory note has been transferred before maturity by way of collateral security for future indorsements to be made to the transferee, which are afterwards made to him, the transferee is to be treated as a bona fide holder. He cannot recover upon the note beyond the amount of the indorsements it was designed to secure the holder against. Williams v. Smith, 2 Hill (N. Y.) 301. Where a note is void as to the payee by reason of his fraud in obtaining it, it is nevertheless good in the hands of a subsequent party who holds it bona fide and for value, having taken it before maturity; but, in case such holder has paid for it less than the value of the note, he can recover only the amount actually paid. Holcomb v. Wyckoff, 35 N. J. Law, 35. But see, as to this question, Lay v. Wissman, 36 Iowa, 305.

[22] Park Bank v. Watson, 42 N. Y. 490; Platt v. Beebe, 57 N. Y. 339; Huff v. Wagner, 63 Barb. 215; Cardwell v. Hicks, 37 Barb. 458; Duncan v. Gilbert, 29 N. J. Law, 527; Atlas Bank v. Doyle, 9 R. I. 76; Maitland v. Citizens' Nat. Bank, 40 Md. 540; Mechanics' & Traders' Bank v. Barnett, 27 La. Ann. 177; Brown v. Callaway, 41 Ark. 420; Bell v. Bean, 75 Cal. 87, 16 Pac. 521.

NOTICE.

125. Notice is either actual or constructive.

126. ACTUAL NOTICE—Means either knowledge or means of knowledge to which the purchaser dishonestly shuts his eyes.

127. CONSTRUCTIVE NOTICE—Means knowledge to be derived either from facts apparent on, or surrounding, or to be inferred from, the face of, or from the facts surrounding, the instrument itself, but of which the purchaser is not shown to have knowledge. Because these facts are thus evident, the purchaser is charged with knowledge of them.

The second element necessary to support the title of the purchaser to the instrument is that it must be without notice. This, like the doctrine of value, rests upon the principles of equity. It is a long-established equity precedent that when several different and successive claims upon the same subject-matter exist, and there is a contest between the owners of these interests, the person who acquires a right to the property with knowledge that another person has already a claim to it is deemed to take it subject to that claim. The first-named person has the superior right to the property, while the last-named person owns in subordination to this right. Lord Hardwicke has explained the reason to be that "the taking of a legal estate after notice of a prior right makes a person a mala fide purchaser. "This," he says, "is a species of fraud and dolus malus itself; for he knew the first purchaser had the clear right of the estate, and, after knowing that, he takes away the right of another person by getting the legal estate. Now, if a person does not stop his hand, but gets the legal estate when he knew the right was in another, machinatur ad circumveniendum." [28] Or, in other words, to express the principle in the language of our later day, and to apply it to the subject-matter of bills and notes, the rule is that when an indorsee takes a bill or note by indorsement, without any

[28] Le Neve v. Le Neve, 2 Amb. 436.

knowledge of the equities of prior parties, he takes it on an independent title by the indorsement, and will not be affected by these equities, because he is not in privity with such prior party, does not claim under him, and is not bound by his acts, frauds, or admissions.[24] But if he has knowledge of these things at the time of the purchase of the instrument, and is privy to them, then, because of his knowledge, his title must be in subordination to their rights. This is the fundamental reason for the effect of notice upon the title of the purchaser; and accordingly we find "notice" defined as "the information concerning a fact, actually communicated to a party, by an authorized person, or actually derived by him from a proper person, or else presumed by law to have been acquired by him, which information is regarded as equivalent in its legal effects to full knowledge of the fact, and to which the law attributes the same consequences as would be imputed to knowledge."[25] And in our examination of the question of notice, we shall direct our inquiry to the facts and rules which, according to the law merchant, charge the purchaser with knowledge of the equities of prior parties, and make his title subject to these equities.

The law merchant, like equity jurisprudence, classifies notice as actual and constructive. Under its rules, notice and knowledge mean not merely express notice, but knowledge or means of knowledge to which the party willfully shuts his eyes.[26] And this definition of notice by Parke, B., which is now accepted as that of actual notice, is probably its best one. But, in the degree of knowledge necessary to be possessed by the purchaser to charge him with notice, the law merchant departs from the rules of equity. In equity

[24] Fisher v. Leland, 4 Cush. (Mass.) 456. In the opinion delivered by Shaw, C. J., in this case, he held that, "when an indorsee takes a bill or note, by indorsement, before it is due, and without notice of fraud or other matter of defense, he takes it on an independent title by the indorsement, and will not be affected by any payment, set-off, fraudulent consideration, or other matter of defense, which the acceptor or promissor might have had against any previous party." Johnson v. Way, 27 Ohio St. 374, Johns. Cas. Bills & N. 185. As holding that an attachment is unavailable against a bona fide holder for value of negotiable paper who obtains it after attachment before maturity, and without notice, see Kieffer v. Ehler, 18 Pa. St. 388.

[25] Pom. Eq. Jur. § 594.

[26] May v. Chapman, 16 Mees. & W. 355.

jurisprudence notice may be knowledge of any fact sufficient to put the purchaser upon inquiry as to the existence of some right or title in conflict with that he is about to purchase. Such knowledge being shown, the court presumes the purchaser either to have made the inquiry or else to have been guilty of negligence equally fatal to his claim to be considered a bona fide holder. It is the duty of each purchaser of other property, if facts are brought directly home to him such as would put a reasonably prudent man upon his guard, to prosecute an inquiry.[27] And if the facts of defense, existing, but latent, would have been discovered if the investigation of the purchaser had been pursued to its natural logical end, then the purchaser, if he did not pursue the inquiry, cannot be deemed to have taken his title in good faith.[28] This doctrine the law merchant rejects.[29] And it is not the rule of the law merchant that the knowledge of any facts sufficient to put the purchaser of a negotiable in-

[27] A bill of exchange was stolen during the night, and taken early the following morning to a discount broker, by a person whose features were known to the broker, but whose name was not known. The broker, being satisfied with the name of the acceptor, discounted the bill, as was his practice, without making inquiry of the person who brought it. In an action on the bill by the broker against the acceptor, the jury were properly directed to find for the defendant if they thought the plaintiff had taken the bill under circumstances which ought to have excited the suspicions of a prudent and careful man. Gill v. Cubitt, 3 Barn. & C. 466. In the case of Hatch v. Searles, 2 Smale & G. 147, it was held that giving a blank acceptance is only prima facie evidence of authority to the person to whom it is given to fill up the bill; and, where the holder of a bill takes it with notice of a circumstance of suspicion, he can be in no better situation than the drawer or indorser who had given no value for the bill.

[28] Williamson v. Brown, 15 N. Y. 354.

[29] Crook v. Jadis, 5 Barn. & Adol. 909. In this case, which was an action by the indorsee against the drawer of an accommodation bill, which had been fraudulently disposed of by the first indorsee, and subsequently discounted by the plaintiff, it was held to be no defense that the plaintiff took the bill under circumstances which ought to have excited the suspicion of a prudent man that it had not been fairly obtained. The defendant must show that the plaintiff was guilty of gross negligence. In Goodman v. Harvey, 4 Adol. & E. 870, it was held that in an action by the indorsee of a bill who has given value, if his title be disputed on the ground that his indorser obtained the discount of such bill in fraud of the right owner, the question for the jury is whether the indorsee acted with good faith in taking the bill. The

strument on inquiry is sufficient to defeat his claim to be considered a bona fide holder,[80] unless he honestly makes an investigation of them. Actual mala fides must be shown to the satisfaction of the jury to deprive a holder for value of the character of bona fide holder,[81] and negligence in not inquiring into facts which ought to have put him on inquiry is not sufficient. Gross carelessness, even, on the part of the holder is not conclusive of notice, though it is, of course, perfectly competent evidence to go to the jury on the question of bad faith.[82] So that in case of bills and notes the purchaser for value is not bound, at his peril, to be on the alert for circumstances which might possibly excite the suspicions of a wary, vigilant man.[83] He does not owe to the party who puts negotiable paper afloat the duty of active inquiry to avert the imputation of bad faith. And the speculative issue of his diligence or negligence does not enter into the question. The question is one simply of good faith in the purchaser; and, unless the evidence makes out a case upon which the jury would be authorized to find fraud or bad faith in the purchaser, it is the duty of the court to direct a verdict for the holder.[84]

question whether or not he was guilty of gross negligence is improper. Goodman v. Harvey, 4 Adol. & E. 870; Backhouse v. Harrison, 5 Barn. & Adol. 1098.

[80] Magee v. Badger, 34 N. Y. 247; Belmont Branch of State Bank v. Hoge, 35 N. Y. 65; Parker v. Conner, 93 N. Y. 118.

[81] "The proper inquiry is, did the party seeking to enforce the payment have knowledge, at the time of the transfer, of the facts and circumstances which impeach the title, as between the antecedent parties to the instrument? And, if the jury finds that he did not, then he is entitled to recover, unless the transaction was attended by bad faith, even though the instrument had been lost or stolen." Clifford, J., in Goodman v. Simonds, 20 How. 343.

[82] Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191, 25 N. E. 402; Seybel v. National Currency Bank, 54 N. Y. 288.

[83] "An individual negotiating for the purchase of a bill or note from one having it in possession, and whose name appears upon it, must assume that the title of the holder, as well as the liability of all the parties, is precisely that indicated by the instrument; that is, he cannot assume that the person in possession has any other or different rights, or that the liability of the parties is other or different from that which the law would imply from the form or character of the instrument." Per Curiam in Central Bank v. Hammett, 50 N. Y. 158.

[84] In the case of Lawson v. Weston, 4 Esp. 56, it was shown that a bill

Constructive notice is a legal inference from established facts. When the facts are not controverted, or the alleged defect appears on the face of the instrument, and is a mere matter of ocular inspection, the question becomes, not one of fact for the jury, but of law for the court. The court determines whether these conceded facts constitute in themselves notice.[35] If so, the notice is not actual, but constructive. It is thus distinguished from actual notice in that it assumes that no direct information of the fact sought to be charged has been, or need be, brought home to the purchaser. He may or may not have had knowledge of the circumstance vitiating his title. But in taking such instruments he is charged with knowledge of the defect, whether he knows of it or not. Instances of this are a restrictive or a conditional indorsement,[36] which being on the face of

had been lost, and the loser had advertised it in the newspaper. The bill was discounted for the person who found it, and thus came by it fraudulently. It was held that the person discounting the bill was entitled to recover the amount, if done bona fide and without notice of the way by which the holder became possessed of it. A bill payable to the order of C D, a married woman, was remitted to her in respect of her separate estate. Her husband, without her knowledge, forged her name on the back of the note, indorsed his own name and gave it to P to get discounted. P did so, but in order to do so indorsed the bill himself, and gave the proceeds to the husband. The acceptor, on notice from C D, refused to pay the holder, who had recourse to P, who paid the note. A suit being brought by C D to establish her title and restrain P from suing the acceptor, it was held that P was a purchaser for value, and that, assuming P to have notice that the bill was in respect of C D's separate estate, yet he was justified in relying on the husband's statement that she had indorsed the bill, as there was nothing to excite suspicion of forgery. Dawson v. Prince, 2 De Gex & J. 41; Magee v. Badger, 34 N. Y. 247; Welch v. Sage, 47 N. Y. 147; Goodman v. Simonds, 20 How. (U. S.) 343; Bank of Pittsburgh v. Neal, 22 How. (U. S.) 99; Murray v. Lardner, 2 Wall. (U. S.) 110; Comstock v. Hannah, 76 Ill. 530; Spitler v. James, 32 Ind. 202; Worcester Co. Bank v. Dorchester & M. Bank, 10 Cush. 488; Spooner v. Holmes, 102 Mass. 503; Miller v. Finley, 26 Mich. 249; Crosby v. Grant, 36 N. H. 273; Johnson v. Way, 27 Ohio St. 374; Phelan v. Moss, 67 Pa. St. 59.

[35] Birdsall v. Russell, 29 N. Y. 220; Claflin v. Lenheim, 66 N. Y. 301.

[36] See supra, pp. 117–125; Ancher v. Bank of England, 2 Doug. 63. In this case a bill was drawn by A on B, payable to C or order, and indorsed by C, thus: "The within must be credited to D, value in account." D being indebted to B, and the bill being sent to B, and accepted by him, and he having given D notice that he had received it and placed it to D's account, it was

the instrument, the purchaser must take at his peril. Another example is overdue paper,[37] or paper which shows on its face that there is something irregular or wrong about it.[38] In all such circumstances it is a part of the legal duty of the purchaser to inquire and ascertain concerning the facts of which the face of the bill or note gives him notice.[39] If he fails to make his inquiry, he fails in his full legal duty, and the equities of the case are with the prior parties, who are allowed to interpose them.

These definite positions were not arrived at until after many

held that this was such a special indorsement as to restrain the negotiability of the bill. Should a forged indorsement be afterwards written upon it, purporting to be by D to pay to E or order, and the bill be discounted, the one discounting must bear the loss. In More v. Manning, Comyn, 311, it was held that an original bill, payable to one and his order, is assignable afterwards to whomsoever it is indorsed, though the words "or his order" be omitted. The omission of these words does not make the indorsement restrictive. In Robertson v. Kensington, 4 Taunt. 30, it was held that, if the payee of a bill annexes a condition to his indorsement before acceptance, the drawee who afterwards accepts it is bound by that condition, and if the condition is not performed the property in the bill reverts to the payee, and he may recover the contents against the acceptor. Treuttel v. Barandon, 8 Taunt. 100. A bill drawn in America on a London house, payable to order, was indorsed by payee generally to A, and by him thus: "Pay to B, or his order, for my use." B applied to his bankers to discount the bill, which they did without inquiry, and applied the proceeds to the use of B. It was held that the indorsement was restrictive, and that the property in the bill remained in A, who could recover its amount from the bankers. Lloyd v. Sigourney, 5 Bing. 525. A agreed to join B in an accommodation note for the latter, provided C would also join, and an instrument was drawn with a blank for name of payee, and this was signed by A. C refused to join, and B afterwards delivered the instrument to D for value, and D's name was inserted as payee. Held, that D could not recover against A. Awde v. Dixon, 6 Exch. 869. In Buckley v. Jackson, L. R. 3 Exch. 135, it was held that an indorsement of a bill of exchange, "Pay J. S., or order, value in account with H. C. D.," was not restrictive. An indorsement of a note without recourse does not affect its negotiable quality. Epler v. Funk, 8 Pa. St. 468.

[37] See supra, pp. 199–205.

[38] Miller v. Crayton, 3 Thomp. & C. (N. Y.) 360.

[39] Thus in Fowler v. Brantly, 14 Pet. 318, it was held that a note overdue, or bill dishonored, is a circumstance of suspicion, to put those dealing for it afterwards on their guard.

changes in the law as it was from time to time administered. And in all the states the law has not yet developed into the settled positions we have given, regulating the degree of knowledge to be possessed by the holder to deprive him of the privileges of the purchaser for value without notice. The old tests are applied, which are not always in terms whether there was actual notice consisting either of direct knowledge of the defense or willful ignorance of it or whether there was constructive notice of the facts. The question is sometimes whether the holder was a bona fide transferee or a purchaser in the due or usual course of business. But these tests mean pretty much the same thing, though it involves a classification a little less exact.

"Bona fides or good faith" is a term used as a mere distinction from mala fides or bad faith. If paper be purchased without anything which the law can construe into notice, it is spoken of as being purchased in good faith. Where, on the contrary, the purchaser has what the law construes to be notice of defects or equities, then he is a purchaser in bad faith, and can secure to himself none of the advantages given to the bona fide purchaser. But bad faith means nothing more than participation in the fraud, and resolves itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith.[40] "It is predicated," said Chief Justice Church, "upon a variety of circumstances, some of them slight, and others of more significance. A perfectly upright, honest man might sell a bond which had been stolen, and the explanation might prevent even the taint of wrong on his part, while the explanation, although falling far short of proof of actual guilt, might leave upon the mind an apprehension that he either directly or impliedly connived at the wrong, or, at least, that he was willing to deal in securities, and keep his eyes and ears closed, so that he should not ascertain the real truth."[41] Good faith, then, is absence of knowledge or means of knowledge on the part of the purchaser of the facts which constitute the defense to the instrument. It is evidenced by the facts of each transaction.[42]

[40] Murray v. Lardner, 2 Wall. 121.

[41] Dutchess Co. Mut. Ins. Co. v. Hachfield, 73 N. Y. 228.

[42] Thus, since "there is no implied authority for one member to indorse or affix the name of the firm to negotiable paper, in which the partnership

So also the term "due or usual course of business" means "according to the usages and customs of commercial transactions." Negotiable paper is taken in the regular course of business when received in transfer in the manner in which mercantile paper is ordinarily used, and when a business man would ordinarily have received the paper under the circumstances in which it was offered, and have parted with his property for it.[43] The meaning of this expression has been somewhat discussed by the courts of Iowa.[44] The view of those courts seems to be that, when a man of ordinary business experience would have been willing to purchase paper circumstanced as the paper was in the cases before them with the expectation of an easy and safe recovery, it was taken in the usual course of business. Thus neither an instrument found unindorsed in the hands of one not the payee and transferred by such holder, nor paper which is overdue, nor a draft in the possession of the acceptor,[45] nor a bill or note taken by operation of law would be taken in course of business.[46] For, in the last case, to acquire title by legal process is not in the regular course of dealing in commercial paper. The transferee pays no value for it. He can only be deemed as occupying exactly the position of the person from whom he derived the instrument, because he is in law his representative. And so in these cases the test of taking the paper resolves itself into mere questions of constructive notice. It may, however, be a question of fraud. For it has been held that where the holder has offered to take for a negotiable instrument a sum so small that the only reasonable interpretation could be that there is something wrong about it, it was willful blindness, and an abstinence from inquiry, so great that the court would treat it as bad faith. The reason is that it is in contravention of the habit of business men to sell valuable rights

has no interest, for third persons, the holder of such paper so indorsed, who takes it with notice that the indorsement was made for the accommodation of the maker, cannot hold the firm liable. * * * The partners are liable to a bona fide holder without notice in such case, only because he has the right to presume that the indorsement was made in the usual course of the partnership business." Fielden v. Lahens, 2 Abb. Dec. 111.

[43] Edw. Bills & N. § 519.

[44] Moore v. Moore, 39 Iowa, 461; Iowa College v. Hill, 12 Iowa, 462.

[45] Central Bank of Brooklyn v. Hammett, 50 N. Y. 158.

[46] Briggs v. Merrill, 58 Barb. 399.

for almost nothing, and the courts deem an act such as this is a necessary implication of fraud. But a modified form of this rule as found in New York courts is probably the true view.[47] It appeared from the evidence that notes obtained through a gross swindle were bought for half price, but no evidence was offered of the good faith of the plaintiff in buying the notes, and it was held that good faith under such a purchase was not presumed, but the plaintiff must show his good faith. Soon afterwards the same point came up in a little different form, and, the plaintiff showing by the evidence his good faith, it was held he was entitled to recover. Thus, the New York courts hold what seems the wiser doctrine, that the smallness of the consideration is a circumstance of suspicion which throws the burden of proof on the holder. But it is not conclusive evidence of notice. It is merely evidence which, if undenied, will destroy the bona fides of the transaction. And it is for the jury to finally decide whether or not the purchaser had such knowledge of the fraud that his purchase of the instrument was a participation in it.[48]

There are two principles to be added to the discussion of the general doctrine of notice. They are: (1) Notice to the purchaser. actual or constructive, must exist at the time of the acquirement of the paper for value, and that (2) notice does not destroy the equities of a purchaser if he in turn is the transferee of a purchaser for value without notice. In regard to the first of these rules, the element of value determines the comparative superiority of the equities of the purchaser and the prior party suffering through fraud or wrong. For unless the purchaser has parted with value for the instrument he has acquired, he is in no worse position than if he had not acquired the instrument at all. If, therefore, before he has parted with value, he receives notice of the defenses of a prior party, according to the well-settled doctrines of equity already referred to he takes in subordination to the prior party's rights. But the payment of a valuable consideration changes the balance of the equities in his favor, and his right to a superior equity becomes fixed, and can be at all times asserted. He is then equipped with all the rights

[47] Vosburgh v. Diefendorf, 48 Hun, 619, 1 N. Y. Supp. 58; Richmond v. Diefendorf, 51 Hun, 537, 4 N. Y. Supp. 375.

[48] Potts v. Mayer, 74 N. Y. 594.

of a bona fide purchaser.[49] And so it is that knowledge of the fraud or wrong suffered by prior parties brought home to the purchaser after the transfer to him for a valuable consideration cannot shake the title he has acquired on his purchase.[50] And this rule goes to the extent that if a valuable consideration is partly paid and partly unpaid, the purchaser is to be protected to the amount which he has in good faith paid,[51] because his equity is to that extent superior to that of the prior party. The reason for the second rule is that the purchaser for value without notice, when he transfers the instrument, transfers without reservation all the rights he had in it. The transferee is subrogated to all these rights. And if such a transferror could have maintained an action upon the bill or note, the purchaser from him is not affected by notice of the defenses of prior parties. In such a case the necessities of the law merchant prevail over the doctrines of equity. The comparative rights of the prior party and the holder are not allowed to come into question. For otherwise the right of the bona fide holder to recover would amount to a property consisting of a right which he could not sell and transfer, and the right of sale and transfer is one of the most important incidents of property. Hence, as soon as the paper comes into the hands of a holder, unaffected by any defect, its character as a negotiable security is established. And subsequent notice of that defect to his transferee cannot affect the right of action upon the paper any more than subsequent notice of any equity to himself.[52]

[49] Weaver v. Barden, 49 N. Y. 286; De Mott v. Starkey, 3 Barb. Ch. 403; Crandall v. Vickery, 45 Barb. 156.

[50] Hoge v. Lansing, 35 N. Y. 136; Howard Banking Co. v. Welchman, 6 Bosw. (N. Y.) 280; Perkins v. White, 36 Ohio St. 530; Woodworth v. Huntoon, 40 Ill. 131, Johns. Cas. Bills & N. 150.

[51] Dows v. Kidder, 84 N. Y. 121; Dresser v. Missouri & I. Ry. Const. Co., 93 U. S. 93, Johns. Cas. Bills & N. 187. This was a case where partial payment only had been made when notice of fraud was given, and payment prohibited. It was held by Justice Hunt that: "The case before us is governed by the rule that the portion of an unperformed contract which is completed after notice of a fraud is not within the principle which protects a bona fide purchaser." Hubbard v. Chapin, 2 Allen, 328; Lay v. Wissman, 36 Iowa, 309.

[52] Northampton Nat. Bank v. Kidder, 106 N. Y. 221, 12 N. E. 577; Miller v. Talcott, 54 N. Y. 114; Farmers' & Citizens' Nat. Bank v. Noxon, 45 N. Y. 762; Chalmers v. Lanion, 1 Camp. 383. This was an action by the second in-

PRESUMPTION AND BURDEN OF PROOF—ORDER OF PROOF.

128. The holder of a bill or note is, in the first instance, presumed to be a holder for value and without notice; but, if it is proved on the trial that the bill or note, in its issue or negotiation, was affected by the defenses hereinafter specified, it is incumbent for the holder to prove that he is such a purchaser.

129. The usual order of proof on a trial is:

(a) To produce the paper sued on.

(b) To prove the signatures of the acceptor or maker; or, if the action is against the indorser of a bill or note or drawer of a bill, to prove their signatures and such indorsements as are necessary to show transfer of title.

(c) To prove, as against the drawer or indorsers, presentment, demand, dishonor, and notice of dishonor to them, or circumstances to excuse these acts.

130. Upon proof of the facts specified in the foregoing section, the holder may rest for his recovery until evidence is adduced showing:

(a) That the holder when he took the paper had notice of the equities.

(b) Or that there was fraud, duress, or illegality in the inception of the contract, or that its nego-

dorsee against the acceptor of a bill of exchange. It was held that if the person who indorsed the bill to the plaintiff could himself have maintained an action upon it, the defendant cannot give in evidence that it was accepted for a debt contracted in smuggling, although it was indorsed to the plaintiff after it had become due. Masters v. Ibberson, 8 C. B. 100; May v. Chapman, 16 Mees. & W. 355; Commissioners of Marion Co. v. Clark, 94 U. S. 278; Porter v. Pittsburg Bessemer Steel Co., 122 U. S. 267, 7 Sup. Ct. 1206; Scotland Co. v. Hill, 132 U. S. 117, 10 Sup. Ct. 26; Verbeck v. Scott, 71 Wis. 63, 36 N. W. 600; Shaw v. Clark, 49 Mich. 384, 13 N. W. 786; Suffolk Sav. Bank v. City of Boston, 149 Mass. 365, 21 N. E. 665; Riley v. Shawacker, 50 Ind. 592; Mornyer v. Cooper, 35 Iowa, 257; Hascall v. Whitmore, 19 Me. 102; Woodworth v. Huntoon, 40 Ill. 131; Bassett v. Avery, 15 Ohio St. 299.

tiation was in fraud of the rights of the defendant, or that it was lost or stolen.

131. Upon proof of facts specified last above, the purchaser must show that he is a purchaser for value without notice.

It is the purpose of this section to show the application of the rules set forth in this and the foregoing chapter in their actual administration in courts of law. These two chapters have attempted to show that, where negotiable instruments are negotiated to a third person, certain defenses will not be allowed to be interposed against him in his action upon the instrument, provided he is a purchaser for value and without notice.[53] In asserting the instrument as a legal right, and enforcing it in court, these principles take the form of presumptions of evidence. By this is meant that it appearing to the court that the instrument is authentic, and is a negotiable bill or note, then judgment of court will generally follow as a matter of course, despite the fact that these defenses exist and are asserted against the title of the holder.[54] This may be made

[53] Where the drawer of a bill payable to his own order, before it is indorsed, gives the acceptor a general release, this is no defense to an action by an indorsee against the acceptor, unless there be proof that the indorsee knew of the release. Dod v. Edwards, 2 Car. & P. 602. In an action by a bona fide indorsee, against the acceptor of a bill of exchange, the defendant is estopped from pleading that the drawer and first indorser was an uncertificated bankrupt when the acceptance was given. Braithwaite v. Gardiner, 8 Q. B. 473. See, also, Hayes v. Caulfield, 5 Q. B. 81. In Ingham v. Primrose, 7 C. B. (N. S.) 82, it was shown that A accepted a bill, and gave it to B (who put his name thereto as drawer). B, having failed to discount the bill, returned it to A, who tore it in half. B afterwards picked up the pieces, joined them, and put the note in circulation. It was held that A was liable upon the bill, at the suit of a bona fide holder without notice. In Wilson v. Nisbet, Mor. Dict. 1509, it was held that drunkenness of the acceptor was no defense against an onerous indorsee.

[54] In an action of assumpsit by the indorsee against the maker of a promissory note, payable to A B or his order, it was held that the defendant, who had made the note so payable, was estopped from saying that A B was not competent to make an order. Drayton v. Dale, 2 Barn. & C. 293. In Smith v. Marsack, 18 Law J. C. P. 65, it was held that the plea by the acceptor that the indorser was a married woman was bad, for a person is not entitled

clearer, perhaps, if the meaning of a presumption is elaborated by showing its application. It must be kept in mind that a court is, so to speak, an invention or machine for administering justice; and that to put this machine in motion it is necessary to bring the facts constituting a wrong to the notice of a judge and jury by written evidence or the sworn testimony of persons who have seen or known the facts to be proved. If these facts are undenied, or controverted and proved, the court then administers a remedy. But this the court of law can only do, and the machinery of justice can only be set in motion, when the facts constituting a violated right are brought before it by competent evidence. Until that time the courts sit idly by, awaiting facts demonstrating affirmatively that some one has been wronged. These facts must be proved in extenso by the person prosecuting the remedy, or the plaintiff. In case of negotiable bills and notes, most of the affirmative proof necessary to establish other kinds of contracts is unnecessary, because the court, upon the production of the instrument, assumes certain facts as proved sufficiently to entitle the plaintiff to judgment, unless the defendant seeks to disprove them. So that in the first stage of the plaintiff's case the court, upon production of the instrument, assumes as proved and acts upon the following facts as true:

(1) That there was a sufficient consideration for the promise or order, or transfer, whether the receipt of a consideration was stated or not.[55]

to dispute the power of another to indorse an instrument, when he asserts by the instrument that the other has such power. In Montague v. Perkins, 22 Law J. C. P. 187, it was held by Jervis, C. J., that "in the case of a blank acceptance, prima facie, the person giving it gives the person to whom it is given an opportunity to fill it up. * * * As between those two there may be secret stipulations, binding upon them, but not binding as between the public and the person giving the blank acceptance." The acceptor of a bill of exchange, payable to the order of the drawer, cannot deny the authority of the drawer to draw or indorse such bill. Halifax v. Lyle, 3 Exch. 446. To the same effect see Barker v. Sterne, 9 Exch. 684, 686. Hogarth v. Latham, 3 Q. B. Div. 643; Baxendale v. Bennett, Id. 525. And see Brook v. Teague, 52 Kan. 119, 34 Pac. 347, Johns. Cas. Bills & N. 189.

[55] Olsen v. Ensign, 7 Misc. Rep. 682, 28 N. Y. Supp. 38; Bottum v. Scott, 11 N. Y. St. Rep. 514; Anthony v. Harrison, 14 Hun, 198, affirmed 74 N. Y. 613; Andrews v. Chadbourne, 19 Barb. 147.

(2) That there was such a delivery of the instrument as is necessary to its legal inception.[56]

(3) That the written terms of the instrument state the facts as therein set forth,[57] the date showing the time of execution [58] and fixing the time of payment; [59] the terms of payment [60] both as to its amount [61] and as to its place.[62]

(4) Possession by the holder in case of an instrument payable to bearer, or indorsed in blank, or, in case of an indorsement in full, possession by the indorsee, presumes title upon a good consideration.[63]

[56] Sawyer v. Warner, 15 Barb. 282. A promissory note was deposited by the maker before delivery, and was not to be delivered until the happening of a certain contingency, but the note was delivered to the payee before the happening of the contingency, and without the consent of the maker. The payee transferred the note for value. Held, that the holder for value might enforce payment against the maker. Fearing v. Clark, 16 Gray (Mass.) 74, citing Putnam v. Sullivan, 4 Mass. 45. The fact that the payee obtained possession of the note by improper means, or that the instrument was stolen, is no defense against an innocent holder for value. Clarke v. Johnson, 54 Ill. 296.

[57] If a person signs a note containing a condition qualifying his liability, which condition is written in pencil, he is guilty of carelessness; and, should the pencil writing be erased, leaving no traces thereof, an innocent holder taking before maturity, for valuable consideration, takes free of any defense arising from the condition, or alteration. Harvey v. Smith, 55 Ill. 224.

[58] Breck v. Cole, 4 Sandf. 80; Germania Bank v. Distler, 4 Hun, 633; 1 Pars. Bills & N. 41.

[59] Joseph v. Bigelow, 4 Cush. 82–84.

[60] Walker v. Clay, 21 Ala. 797; Blakemore v. Wood, 3 Sneed (Tenn.) 470.

[61] Norwich Bank v. Hyde, 13 Conn. 282. Pars. Bills & N. 333–338; Abb. Tr. Ev. 411.

[62] As holding that the maker or indorser of a note cannot, in an action on the note by an indorsee for value, who took the note before maturity, show that, though dated at one place, it was made at another, by the laws of which latter place it was void for usury, see Towne v. Rice, 122 Mass. 67.

[63] James v. Chalmers, 6 N. Y. 209; Kidder v. Horribin, 72 N. Y. 159. In Peacock v. Rhodes, 2 Doug. 633, it was held that, where a bill of exchange with a blank indorsement had been stolen and negotiated, the innocent indorsee might recover on it. In Price v. Neal, 3 Burrows, 1355, it was held that an innocent indorsee could not be compelled to refund the money paid to him on a forged acceptance. If a bill of exchange be drawn in favor of a fictitious payee, and that circumstance be known as well to the acceptor as the drawer, and the name of such payee be indorsed on the bill, an innocent in-

(5) That the instrument is unpaid.[64]

(6) That in case of an undated indorsement the transfer and indorsement were made before the maturity of the instrument and without notice.[65] Thus the instrument itself is proof of most of the preliminary facts necessary to establish a right of action, and it remains to authenticate it as a valid instrument.

Having once produced the paper with these presumptions attached to it, it becomes necessary for this purpose to prove the following facts:

(1) If the action is by the payee against the maker or acceptor, prove the maker's or acceptor's signature.[66] It is unnecessary to prove a demand of the maker or acceptor because the suit is itself a sufficient demand.[67]

(2) In an action brought by an indorsee against the acceptor, the holder must prove the signatures of acceptor and also the payee.[68]

dorsee for a valuable consideration may recover on it against the acceptor, as on a bill payable to bearer. Minet v. Gibson, 3 Term R. 481. If A deposit bills indorsed in blank, with B, his banker, to be received when due, and the latter raise money upon them by pledging them with C, another banker, and afterwards become bankrupt, A cannot maintain trover against C for the bills. Collins v. Martin, 1 Bos. & P. 648. And see Mechanics' Bank v. Straiton, *42 N. Y. 365. In a suit by the holder of a note indorsed by the payee in blank, it is the legal presumption that the holder purchased directly from the payee. Peaslee v. Robbins, 3 Metc. (Mass.) 164. Where indorsers commit a promissory note to the maker, with a blank for the date, they authorize him to fill it up with what date he pleases. Mitchell v. Culver, 7 Cow. (N. Y.) 336.

[64] McKyring v. Bull, 16 N. Y. 297; Daniel, Neg. Inst. § 1200. Although a bill of exchange cannot be reissued after it has arrived at maturity and been once paid, yet if it is paid, and afterwards indorsed before it becomes due, it is a valid security in the hands of a bona fide indorsee. Burbridge v. Manners, 3 Camp. 193, 194.

[65] Hendricks v. Judah, 1 Johns. 318; Andrews v. Chadbourne, 19 Barb. 147; Lewis v. Lady Parker, 4 Adol. & E. 838; Parkin v. Moon, 7 Car. & P. 408; New Orleans Canal & Banking Co. v. Montgomery, 95 U. S. 16; Leland v. Farnham, 25 Vt. 553; Mason v. Noonan, 7 Wis. 609; Mobley v. Ryan, 14 Ill. 51; Webster v. Calden, 56 Me. 204.

[66] Edw. Bills & N. § 465; Abb. Tr. Ev. p. 391.

[67] Green v. Goings, 7 Barb. 652.

[68] Where a bill is drawn in the name of a fictitious person, payable to the order of the drawer, the acceptor is considered as undertaking to pay to the

The proof of the latter signature is not for the purpose of fixing the liability of the payee, but of proving that the title is in the holder.[69]

(3) In an action against an indorser of a bill or note, the plaintiff need not prove the signature of the maker,[70] drawer,[71] or prior indorsers, because, on proof of the defendant's signature, the indorser is deemed to warrant that of the prior indorsers.[72] In such case it is necessary to prove only the signatures of the persons sought to be recovered against.

(4) In case of a note or bill payable in blank or to bearer, no proof of title by proving signatures of indorsers is necessary;[73] but, where it is sought to recover against a party from whom title is derived through special indorsements, the signatures of special indorsers must be proved.[74]

order of the person who signed as drawer; and therefore an indorsee may bring evidence to show that the signatures of the drawer, to the bill and to the first indorsement, are in the same handwriting. Cooper v. Meyer, 10 Barn. & C. 468. In Robinson v. Yarrow, 7 Taunt. 455, it was held that the acceptance of a bill drawn by procuration admits the drawer's handwriting, and the procuration to draw. In an action by the indorsee against the acceptor of a bill of exchange, the witness called to prove the handwriting of the drawer stated that neither the drawing nor indorsement were of the handwriting of the person whose they purported to be. But it was proved that the defendant had acknowledged the acceptance to be his, and it was contended that, as the acceptance admitted the drawing to be correct, the jury might find for the plaintiff, if they thought, upon inspection of the bill, that the drawing and indorsement were of the same handwriting. It was held necessary, however, that some proof should be given as to whose the handwriting was. Allport v. Meek, 4 Car. & P. 267. A bill purporting to be drawn by B. & W. (a real firm), payable to their order, and indorsed by them, was negotiated by the acceptor with that indorsement upon it. Both drawing and indorsement were forgeries. It was held that if the bill was accepted, and negotiated by the acceptor with knowledge of the forgery, he was estopped to deny the indorsement, as well as the drawing, by B. & W. Beeman v. Duck, 11 Mees. & W. 251.

[69] Coggill v. American Exch. Bank, 1 N. Y. (1 Comst.) 115; Canal Bank v. Bank of Albany, 1 Hill, 287.

[70] Dalrymple v. Hillenbrand, 62 N. Y. 5.

[71] Rosc. N. P. Ev. 381–399.

[72] Goddard v. Merchants' Bank, 4 N. Y. 147; Turnbull v. Bowyer, 40 N. Y. 456.

[73] James v. Chalmers, 6 N. Y. 209. See, also, supra, p. 110.

[74] See supra, p. 114.

(5) Where the recovery is sought against a drawer[75] or an indorser or indorsers,[76] the plaintiff, in addition to this fact, must prove that the paper was duly presented for acceptance or payment and dishonored, and that due notice thereof was given to the defendant.[77]

The plaintiff having established all that is necessary to entitle him to judgment, it becomes incumbent upon the defendant to prove his defense, which he does by proving in extenso whatever facts may constitute it. And here the presumptions vary accordingly as the action is between immediate parties or between a remote party and a bona fide holder. In case of an action litigated between immediate parties, the general rule is that the evidence produced upon the various issues is governed by the rules governing the production and establishment of those issues in case of ordinary contracts. But where the litigation is between a purchaser for value and a prior party, the further evidence depends upon whether the facts proved by the defendant are those constituting a real defense or a personal defense. If the defense is a real defense, the character of a purchaser for value without notice cannot avail the holder, and the question to be established is solely whether the real defense does or does not exist and is established according to the process in ordinary cases of contract. But where the defense is a personal one the cases divide themselves into two classes, and these are: (1) Cases where the defense proved shows lack or failure of consideration or the payment or discharge[78] of the bill or note; (2) cases where the defense proved shows fraud, duress,[79] or the illegality of consid-

[75] Shultz v. Depuy, 3 Abb. Prac. 252.

[76] Clift v. Rodger, 25 Hun, 39.

[77] Conkling v. Gandall, 1 Abb. Dec. 423.

[78] In Morley v. Culverwell, 7 Mees. & W. 174, the facts were that the drawer of a bill, before it came due, agreed with the acceptor that, on his giving a certain mortgage security for the amount, he (the drawer) should deliver up to him the bill as discharged and fully satisfied. The acceptor executed the mortgage, and received back the bill uncanceled. It was held that the drawer was liable on the bill to a party to whom the acceptor afterwards indorsed it, for value, before it came due.

[79] In an action by the indorsee against the drawer of a bill of exchange, if it appears that the defendant drew the bill without consideration, and under

eration [80] in the inception of the instrument. In the first class of cases the general presumption prevails that the indorsee of a negotiable bill or note is a bona fide holder for value.[81] This presumption is not repelled merely by proof that the bill or note, as between the immediate parties, was without consideration,[82] or that the consideration failed,[83] or was made, indorsed, or accepted by one for the sole accommodation of the other.[84] When no other proof is given, the holder is not bound to prove a valuable consideration. Thus, unless the defendant proves that the plaintiff had notice of the fact of such want or failure of consideration or of the payment or discharge of the bill or note, or proves that for some reason the plaintiff is not a bona fide holder for value,[85] then these facts are irrelevant, and the defense will not be received. But if the defendant first proves by evidence sufficient to go to the jury that the transfer

duress, it is incumbent on the plaintiff to prove that he gave value for it, although it was indorsed to him before it came due. Duncan v. Scott, 1 Camp. 100.

[80] A bill legal in its inception, and payable to A, was indorsed by him to B for an usurious consideration, who passed it to a third person, for valuable consideration, without notice of the usury, by whom it was paid to B's assignees, after his bankruptcy, in satisfaction of a debt. Held, that the indorsement of A to B on an usurious account did not avoid the bill in the hands of an innocent holder, by virtue of the statute of usury. Parr v. Eliason, 1 East, 92.

[81] Ross v. Bedell, 5 Duer (N. Y.) 462; Case v. Mechanics' Banking Ass'n, 4 N. Y. 166.

[82] "The maker of a negotiable instrument is not allowed to impair its value in the hands of a bona fide holder by denying the existence of a consideration, or by otherwise showing that it is not what it purports to be." Lewis, J., in Lennig v. Ralston, 23 Pa. St. 137. In Moore v. Baird, 30 Pa. St. 138, it was held that "a holder for value may recover though he knew at the time he purchased that it was an accommodation note, and that there was no consideration between the maker and the payee."

[83] Mechanics' & Traders' Nat. Bank v. Crow, 60 N. Y. 85.

[84] Harger v. Worrall, 69 N. Y. 370. When the payee disposes of an accommodation note at less than its face, the transaction is usurious, even though the indorsee takes without notice. Whitten v. Hayden, 7 Allen (Mass.) 407.

[85] Brookman v. Millbank, 50 N. Y. 378; Abb. Tr. Ev. 441; Wright v. Irwin, 33 Mich. 32; Gray v. Bank of Kentucky, 29 Pa. St. 365; Wilson v. Lazier, 11 Grat. 478; Whittaker v. Edmunds, 1 Moody & R. 366.

to the plaintiff was in bad faith,[86] or without value,[87] he may then prove the facts of his defense. On such proof by the defendant it becomes incumbent on the plaintiff to prove that he is a holder in good faith and for value. And if he cannot prove this, he must disprove the facts of the defendant's defense, or else he cannot recover.

Cases where the defense is fraud or illegality of consideration are distinguished from the defenses first mentioned in that their proof by the defendant changes the presumption that the holder is one in good faith and for value, and throws the burden of proving these facts in the first instance upon the plaintiff. It being shown that the bill or note, or the transfer thereof, is tainted with fraud or illegality, the assumption is that the holder is a partaker in the fraud or illegality, and he must prove that he is not. In the often-quoted case of Duncan v. Scott,[88] where a bill was given by the defendant under coercion and fear of death, Lord Ellenborough said: "It is incumbent upon the plaintiff to give some evidence of consideration;" and this principle has been followed in many cases in England, and in most of the states of the United States.[89] It has been explained to mean that a plaintiff suing upon a negotiable note or bill purchased before maturity is presumed, in the first instance, to be a bona fide holder. But when the acceptor or maker has shown the bill or note was obtained from him under duress, or that he was defrauded of it, the plaintiff will then be required to show under what circumstances and for what value he became a holder. The reason for this rule is that where there is fraud, it is but reasonable to suppose that he who is guilty of it will part with the instrument for the purpose of enabling some third party to recover upon it. Such presumption operates against the holder and devolves upon him the duty of showing value and lack of notice in rebuttal of the

[86] Smith v. Sac Co., 11 Wall. 139–147.

[87] First Nat. Bank v. Green, 43 N. Y. 298; Collins v. Gilbert, 94 U. S. 753.

[88] Duncan v. Scott (1807) 1 Camp. 100.

[89] Clark v. Pease, 41 N. H. 414; Paton v. Colt, 5 Mich. 505; Carrier v. Cameron, 31 Mich. 373; Kellogg v. Curtis, 69 Me. 212; Smith v. Livingston, 111 Mass. 342; National Bank v. Kirby, 108 Mass. 497; Rock Island Nat. Bank v. Nelson, 41 Iowa, 563; Bailey v. Bidwell, 13 Mees. & W. 73; Harvey v. Towers, 6 Exch. 656; Smith v. Braine, 16 Q. B. 244.

duress or fraud in order to maintain his action.[90] In the cases of illegality the rule is the same, and for the same reason. The burden is cast upon the plaintiff to show that he took the paper for value and in good faith. Some of the cases declare that the holder need not show he had lack of notice, but need only show value,[91] because the burden of showing notice is upon the party who seeks to impeach the title. But the other courts maintain, and properly, that, in addition to proving value, the holder should prove that he bought the note in good faith, and should show that he had no knowledge or notice of the fraud.[92] He should show, also, that he paid value for the note; and, if value and notice are disputed as facts, they must be passed upon by the jury. Hence it follows that it is not necessary for the defendant, as in case of lack or failure of consideration, to show that the plaintiff did not pay value, or that he had notice of the facts of the defense, but these facts must appear affirmatively on the plaintiff's part. It is probable that this rule does not mean that the plaintiff must prove a direct negative,[93] but that, as a part of the direct case, he must show the facts of the transaction constituting the transfer, and then, if there is nothing in the transaction itself to show bad faith, and there is no proof from other sources of want of good faith, or actual or constructive notice of the defense, the plaintiff must prevail.

[90] First Nat. Bank v. Green, 43 N. Y. 298; Wilson v. Rocke, 58 N. Y. 642; Harger v. Worrall, 69 N. Y. 370.

[91] Jones v. Gordon, 2 App. Cas. 16; Kellogg v. Curtis, 69 Me. 212; National Bank v. Kirby, 108 Mass. 497.

[92] Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191, 25 N. E. 402; Vosburgh v. Diefendorf, 119 N. Y. 357, 23 N. E. 801. See, also, Northampton Nat. Bank v. Kidder, 106 N. Y. 221, 12 N. E. 577; Farmers' & Citizens' Bank v. Noxon, 45 N. Y. 762; Cummings v. Thompson, 18 Minn. 246 (Gil. 228); Sullivan v. Langley, 120 Mass. 437; Smith v. Livingston, 111 Mass. 342.

[93] Sullivan v. Langley, 120 Mass. 437; National Bank v. Kirby, 108 Mass. 497.

CHAPTER IX.

PRESENTMENT AND NOTICE OF DISHONOR.

132. In General.
133–140. Presentment.
141–144. By Whom and to Whom Made—Effect of Failure to Present and Protest.
145–146. Notice of Dishonor.
147. Excuses for Failure to Present or to Give Notice.

IN GENERAL.

132. To charge the drawer and indorsers, presentment for acceptance or for payment, as the case may be, to be followed in case of refusal by notice of dishonor, is necessary.

The doctrines of presentment, protest, and notice of dishonor relate peculiarly to the liabilities of the drawer and indorser. These acts, on the part of the holder, are a condition or stipulation which the law merchant embodies in the contracts of each of them. They are so much of the essence of the contract that, unless the holder fulfills them in exact accordance with the requirements of law, he cannot in most circumstances enforce the instrument. We have already pointed out [1] that the law construes the contract of the drawer and also of the indorser to be distinct promises to every party who subsequently takes the instrument, to pay the instrument if the acceptor or maker does not. And we have also pointed out [2] that the law implies as a condition of the enforcement of this contract of indemnity that the holder shall first seek the payment of the instrument from the persons primarily liable to pay it. If the instrument is not paid by them, then there is prescribed a system of formalities to be strictly followed to enable the holder to claim at the law's hands the enforcement of the drawer's or indorser's liability. These formalities are usually, though perhaps inaccurately,

[1] See supra, pp. 153–156. [2] See supra, pp. 153–156.

known as "presentment," "demand," "non-payment," "protest," and "notice of dishonor," some or all of them to be followed according as the case may be. And it is our purpose to take up each of these steps in their order, to show their nature and the rules relating to them. We shall first examine the subject of presentment, stating the rules as to its nature and the time within which, the place where, and persons by whom and to whom it should be made.

PRESENTMENT.

133. The presentment of a bill or note is commonly as follows:

(a) Of a bill for acceptance.

(b) Of a bill or note for payment.

134. A bill or note is presented by exhibiting it and requesting its acceptance or payment. When made, the instrument must be in the possession of the person presenting the same.

135. Presentment for acceptance may be made at any time before maturity, except in cases of bills payable at sight, or after demand, or after sight.

136. Bills payable at sight or on demand, or after demand, or after sight, or after any other uncertain event, must be presented within a reasonable time.

137. Presentment for payment must be made on the day when the bill or note is due. A bill or note properly presented for payment must be paid forthwith.

138. Presentment should be made during usual and reasonable hours.

139. The presentment for acceptance, if the bill is addressed to the drawee at a particular place, should be made at that place. If the bill is not addressed to any particular place, presentment should be made either to the drawee personally, or at his dwelling or place of business at the time of presentment.

140. It is not necessary that a presentment for payment should be personal. It is sufficient if made at the place specified in the instrument, or personally if the maker or acceptor waives his right of having it made at the place stipulated in the contract, or, if no place is specified in the instrument, then if made at the place of business or residence of the maker or acceptor.

A proper legal presentment consists of an actual exhibition of the paper [3] to the drawee, acceptor, or maker. In case of a presentment for payment, the reasons for a personal presentment and an exhibition of the bill [4] are that the acceptor or maker may judge of the genuineness of the bill; that he may judge of the right of the holder to receive the contents; and that he may obtain immediate possession of the bill or note, upon paying its amount.[5] In case of pre-

[3] Daniel, Neg. Inst. §§ 462, 463; Edw. Bills & N. § 558.

[4] Musson v. Lake, 4 How. 262.

[5] In the case of Hansard v. Robinson, 7 Barn. & C. 9, which was an action by an indorsee against the acceptor of a bill of exchange, it was shown that the bill was not presented for some time after it was due and that the defendant offered another bill, but before such bill was given, the first bill was lost by the plaintiff's clerk. It was said by Lord Tenterden, C. J., in his opinion, that it was the custom of merchants that: "The holder of the bill shall present the instrument, at its maturity, to the acceptor, demand payment of the amount, and upon receipt of the money deliver up the bill. The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge pro tanto in his account with the drawer." As to the acceptor's remedy should the holder refuse to deliver the bill after receipt of payment, see Alexander v. Strong, 9 Mees. & W. 733; Stone v. Clough, 41 N. H. 290; Otisfield v. Mayberry, 63 Me. 197. In the case of Pierson v. Hutchinson, 2 Camp. 211, it was held by Lord Ellenborough that in case of the loss of a bill, the indorsee cannot recover against the acceptor, though an indemnity be offered. The bill must be shown to have been destroyed. In Ramuz v. Crowe, 11 Jur. 715, it was held that the payee of a negotiable note which has been lost cannot, without producing the note, maintain an action thereon, at its maturity, against the acceptor. As to instruments which have been destroyed, see Blackie v. Pidding, 11 Law T. 203. As to whether the owner of a lost note may recover against the indorser, upon giving indemnity, it was held by Hoar, J., in Tuttle v. Standish, 4 Allen (Mass.) 481, that "all the considerations against allowing such a recovery apply more forcibly to the case where payment is demanded of an

sentment for acceptance, the reasons for a personal presentment are that the acceptor has a right to see that the person demanding it has a right to do so before he is bound to answer whether he will accept or not, and that in those jurisdictions where it is required that the acceptance should be written on the paper, a demand for acceptance would clearly be futile unless the paper were at hand to write the acceptance upon it. But as these reasons show, this rule is for the protection of the drawee, acceptor, or maker, and he may therefore waive them by not insisting upon a personal presentment. If the holder is in a situation to comply with their demand for personal presentment it is sufficient. Hence, if the holder has the bill or note with him at the time of presentment, and so describes it as to leave no doubt but that the drawee, acceptor, or maker understands what the instrument in question is, and the drawee, acceptor, or maker does not require him to produce it, then a refusal or omission to accept or pay will subject all parties to the consequent penalties.[6] The sole requirement is that the instrument must be in the possession of the person presenting it whether exhibited or not.[7] The demand for acceptance or payment in ordinary cases should be verbal, but in some cases this may be impracticable or not in reason to be required. In such cases it may be in writing. But, however made, it should be absolute, requiring present actual acceptance or payment.[8]

indorser, for he is entitled to the possession of the note in order to have his recourse over against the maker."

[6] Etheridge v. Ladd, 44 Barb. 69; Ocean Bank v. Fant, 50 N. Y. 475; Crandall v. Schroeppel, 1 Hun, 557; Freeman v. Boynton, 7 Mass. 483; Draper v. Clemens, 4 Mo. 52; Nailor v. Bowie, 3 Md. 251; King v. Crowell, 61 Me. 244; Fisher v. Beckwith, 19 Vt. 31; Fullerton v. Bank of U. S., 1 Pet. 604.

[7] In Arnold v. Dresser, 8 Allen (Mass.) 435, which was an action against the indorser of a joint promissory note, the facts were that upon the day of maturity payment was demanded of the promisors, but the demandant did not have the note in his possession, and he did not receive payment. It was held by Bigelow, C. J., that "no valid presentment and demand can be made by any person without having the note in his possession at the time, so that the maker may receive it in case he pays the amount due, unless special circumstances, such as the loss of the note, or its destruction, are shown to excuse its absence."

[8] Story, Prom. Notes, § 242. "A demand of payment, at the place indicated

The dishonor of a bill of exchange is the non-compliance on the part of the drawee or acceptor with the conditions, which the law has construed to be embodied in the order contained in it. The order contained in a bill of exchange on the part of the drawer and indorser is (1) an order on the drawee to accept the bill on presentment; (2) an order on the drawee or acceptor to pay the bill at maturity. The refusal of the drawee or acceptor to do either of these things dishonors the bill.[9] The contract which the drawer and indorser thus makes with the holder is that the drawee will, in the first place, accept the bill. It differs in cases of bills payable after sight or after demand and bills payable after a given date, because in the former cases from the terms of the contract the time for which the drawer or indorser indemnifies the holder is uncertain and indefinite. To prevent this from becoming a hardship to these parties, the law declares that in cases of bills made payable after sight, or after demand, or upon any other event not absolutely certain, the contract of the drawer and indorser is that the drawee, on the bill being presented to him in a reasonable time from the date, shall accept it, and, having so accepted, shall pay it when duly presented for payment.[10] But in case of a bill payable a certain time after date, the contract of the drawer and indorser is that the drawee shall accept it if it is presented to him before the time of payment; and, having so accepted, shall pay it when it is in due course presented for payment. The contract of the drawer and indorser is distinguished from their contract on bills payable after demand, or after sight, in that the drawer, by fixing a day certain for payment, assumes the responsibility of providing funds at that time, and the indorser makes a new bill on the same terms, and waives his right of immediate acceptance by putting his bill into circulation without ac-

in the note, on or after its maturity, is a pre-requisite to the right of recovery." Martin, J., in Wood v. Mullen, 3 Rob. (La.) 395, 396.

[9] Ames, Bills & N. p. 787; Edw. Neg. Inst. §§ 529–535.

[10] Allen v. Suydam, 20 Wend. 321; Aymar v. Beers, 7 Cow. 705; Robinson v. Ames, 20 Johns. 146; Elting v. Brincherhoff, 2 Hall (N. Y.) 459; Muilman v. D'Eguino, 2 H. Bl. 569; Wallace v. Agry, 4 Mason, 336, Fed. Cas. No. 17,096; Id., 5 Mason, 118, Fed. Cas. No. 17,097; Mitchel v. De Grand, 1 Mason, 176, Fed. Cas. No. 9,661; Nichols v. Blackmore, 27 Tex. 586; Mullick v. Radakissen, 9 Moore, P. C. 46.

ceptance. Presentment for acceptance in this case is therefore not absolutely essential,[11] for, if the bill is not presented for acceptance at all, nevertheless the drawer and indorser make a contract that the drawee shall pay it when duly presented for payment.

[11] Plato v. Reynolds, 27 N. Y. 586. In this case it was said by Marvin, J., that "it is not necessary, as to the liability of the drawer, that the bill should be presented for acceptance. If it is duly presented for payment, and payment is refused, and the drawer has notice, he remains liable." "In relation to a bill payable at a day certain, as at a fixed time after its date, it is perfectly well settled not only in this country and in England, but also in Scotland, and in France, that the drawer or indorser of the bill is not discharged by the neglect of the holder to present the same for acceptance immediately, or until the time when it becomes due and payable." Opinion in Allen v. Suydam, 20 Wend. (N. Y.) 321, 323. "The drawer who issues his bill into the world without procuring its acceptance is not without some degree of blame. He issues it in an imperfect state, and cannot justly complain of the neglect of any indorsee who takes the bill in this state, being cognizant of no circumstances to vitiate it, and looking merely at the names upon it." Lord Ellenborough, C. J., in Dunn v. O'Keefe, 5 Maule & S. 282. In the same case, Bayley, J., concurring, said: "Although the want of notice may be a good defense as against the indorser, it affords none as against an innocent indorsee. The drawer might avoid all difficulty by drawing the bill payable to his own order, and procuring an acceptance before issuing it. If he draw it payable to a third person, and issue it in its unaccepted state, the imperfection lies at his door, and he must take the consequence." In the case of Heylyn v. Adamson, 2 Burrows, 669, it was objected that "the action would not lie against the defendant [the indorser] until a demand of payment had been made upon the drawer"; but in the opinion of the court, delivered by Lord Mansfield, the decision as to a foreign bill of exchange in the case of Bromley v. Frazier, 1 Strange, 441, was affirmed, and it was also held: "To entitle the indorsee of an inland bill of exchange to bring an action against the indorser upon failure of payment of the drawee, it is not necessary to make any demand of, or inquiry after, the first drawer." "If the indorsee does not demand the money payable by the bill, of the person upon whom it is drawn, in convenient time, and afterwards he fails, the indorser is not liable." Holt, C. J., in Lambert v. Oakes, 1 Ld. Raym. 443. As to the necessity for two presentments in the case of sight bills, see Philpott v. Bryant, 3 Car. & P. 244. In Colt v Barnard, 18 Pick. (Mass.) 260, it was held that a note indorsed after maturity is like a bill payable at sight, and presentment to maker is necessary in order that indorser may be charged. Bank of Washington v. Triplett, 1 Pet. 25; House v. Adams, 48 Pa. St. 261; Walker v. Stetson, 19 Ohio St. 400; Bank of Burlington v. Raymond, 12 Vt. 401; Bachellor v. Priest, 12 Pick. 399; Orr v. Maginnis, 7 East, 362; Goodall v. Dolly, 1 Term R. 713; Blesard v. Hirst, 5 Burrows, 2670.

Protest for non-acceptance is thus only for the security of the holder. He has the option of seeking from the drawer and indorser a remedy for non-acceptance or a remedy for non-payment. If by protest and notice of non-acceptance he has put himself in a condition to sue the drawer and indorser, he may, as a matter of prudence, retain the bill, and endeavor to obtain payment from the drawee when the bill has arrived at maturity, and not involve himself in a litigation until there has been a failure of payment as well as of acceptance.[12] But by non-acceptance followed by protest and notice of dishonor, an immediate right of action accrues to the holder against both the drawer and indorsers.[13] And in all these cases the contract of the drawer and indorsers stand upon a similar footing.[14]

The following rules are the principal ones relating to instruments payable at or after demand and at or after sight:

(1) Instruments payable on demand need not be presented for acceptance, but they must be presented for payment within a rea-

[12] Whitehead v. Walker, 9 Mees. & W. 506. In this case it was held that the holder of a bill of exchange, on non-acceptance and protest, and notice thereof, has an immediate right of action against the drawer, and does not acquire a fresh right of action on the non-payment of the bill when due. The statute of limitations, therefore, runs against him from the former, and not from the latter, period.

[13] Mason v. Franklin, 3 Johns. 202; Welden v. Buck, 4 Johns. 144; Watson v. Loring, 3 Mass. 557; Union Bank v. Hyde, 6 Wheat. 572; Sterry v. Robinson, 1 Day, 11; Thompson v. Cumming, 2 Leigh, 321; Smith v. Roach, 7 B. Mon. 17; Bright v. Purrier, 3 Burrows, 1687; Milford v. Mayer, 1 Doug. 55; Evans v. Gee, 11 Pet. 80; Lucas v. Ladew, 28 Mo. 342; Exeter Bank v. Gordon, 8 N. H. 66.

[14] Ballingalls v. Gloster, 3 East, 481. It was held in this case by Lord Ellenborough, C. J., that "there is no distinguishing the case of an indorser from that of the drawer, it having been long ago decided that every indorser is in the nature of a new drawer, every indorsement as a new bill, and that the indorser stands, as to his indorsee, in the law merchant, the same as the drawer." See, also, the case of Heylyn v. Adamson, 2 Burrows, 669, where it is said by Lord Mansfield that when a bill of exchange is indorsed, "as between the indorser and indorsee, it is a new bill of exchange, and the indorser stands in the place of the drawer." See, also, the opinion in the case of Suse v. Pomp, 30 Law J. C. P. 75. In Peck v. Mayo, 14 Vt. 33, it was said by Redfield, J.: "No man, I apprehend, doubts that the indorser of a note or bill is liable, in regard to the principal debt, to the same extent as the original debtor."

sonable time.[15] In case of instruments payable after demand, the demand must be made within a reasonable time.

(2) Instruments payable at or after sight must be presented for acceptance or payment within a reasonable time.[16]

Time of Presentment.

The reason why bills payable on demand and at sight differ in the necessity for their presentment for acceptance is from the difference of meaning of the terms embodied in the contract. The term "demand" is construed to mean an order to pay forthwith upon presentment. The common-law theory was that even demand was unnecessary, because it evidenced a debt in præsenti where the debt itself was precedent to any demand.[17] Hence, demand notes and instruments of that character were not, in

[15] Walker v. Stetson, 19 Ohio St. 400, Johns. Cas. Bills & N. 89. A purchased a draft on C, of New York, on March 17th, in Erie, Pa. On March 27th he sold the draft to a bank in Newark, N. J., and the bank presented it on the 28th of the same month. Payment was refused, and the draft protested. It was held that, under the circumstances, the presentment was in reasonable time. Newark Banking Co. v. National Bank of Erie, 63 Pa. St. 404. A promissory note, payable on demand, with interest, was held in the case of Merritt v. Todd, 23 N. Y. 28, to be a continuing security. The holder of such note is not chargeable with neglect by reason of failure to make demand within a certain time.

[16] "The law is settled by an unbroken line of decisions that all drafts, whether foreign or inland bills, must be presented to the drawee within a reasonable time. * * * But what is a reasonable time, under all the circumstances, is sometimes a most difficult question. The general doctrine is, each case must depend on its own peculiar facts, and be judged accordingly." Scott, J., in Montelius v. Charles, 76 Ill. 303. See, also, Robinson v. Ames, 20 Johns. 147; Jordan v. Wheeler, 20 Tex. 698. In the case of Otsego County Bank v. Warren, 18 Barb. (N. Y.) 290, it was held that a notary's certificate of protest which stated that a certain bill of exchange had been presented "to one of the firm of W. C. & Co., the acceptors," for payment, was not sufficient. As holding that proof of the insolvency of the maker or drawer is not sufficient to excuse neglect of presentation, see Smith v. Miller, 52 N. Y. 545; Terry v. Parker, 6 Law J. R. (N. S.) 249. See, also, Pier v. Heinrichshofen, 6 Cent. Law J. 285; Turner v. Stones, 1 Dowl. & L. 122; Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283, and Johns. Cas. Bills & N. 104; Cory v. Scott, 3 Barn. & Ald. 619.

[17] Capp v. Lancaster, Cro. Eliz. 548; Rumball v. Ball, 10 Mod. 38; Collins v. Denning, 3 Salk. 227; 15 Vin. Abr. 103.

general, entitled to grace.[18] But "at sight" means the same thing as "upon acceptance." And, as a general thing, a bill or note payable at sight or after sight does not become due until it is seen or accepted.[19] Hence, bills payable at sight are held to be entitled to grace,[20] because they do not become due until an opportunity for their acceptance is given, and, if accepted, the acceptor is entitled to the usual extension of time to pay them. As a consequence of the construction of these terms, bills payable on demand need not be presented at all for acceptance, but need only be presented for payment.[21] But the law nevertheless limits the time for which they may be held as a security, and bills or notes payable on demand must be presented for payment within a reasonable time, or else they will be treated as overdue.[22] If transferred after a reasonable time, they are subject to equities,[23] and the transferee is charged with constructive notice, because the term "demand" implies a short

[18] 1 Pars. Notes & B. 407; Story, Prom. Notes, § 224; Story, Bills, § 342; Cammer v. Harrison, 2 McCord, 246; First Nat. Bank of Davenport v. Price, 52 Iowa, 570, 3 N. W. 639; Luckey v. Pepper, Morris (Iowa) 490.

[19] Campbell v. French, 6 Term R. 200, 2 H. Bl. 163; Sutton v. Toomer, 7 Barn. & C. 416; Holmes v. Kerrison, 2 Taunt. 323; Sturdy v. Henderson, 4 Barn. & Ald. 592. In Thorpe v. Booth, Ryan & M. 388, it was held that the statute of limitations did not run against a note payable 24 months after demand until demand had been made. A promissory note was made in the following form: "I promise to pay M. A. D., or bearer, on demand, the sum of £16 at sight." Held, that no action was maintainable without a presentment for sight. Dixon v. Nuttall, 1 Cromp., M. & R. 306. As holding that the statute of limitations runs from the date of a note payable on demand, and not from the time of demand, see Norton v. Ellam, 6 Law J. Exch. 121. In Sanderson v. Bowes, 14 East, 500, which was an action in assumpsit on a promissory note, it was held that the declaration must aver presentment at the place. See, also, Aymar v. Sheldon, 12 Wend. (N. Y.) 439.

[20] Hart v. Smith, 15 Ala. 807; Thornburg v. Emmons, 23 W. Va. 325; Janson v. Thomas, 3 Doug. 421.

[21] Daniel, Neg. Inst. § 454.

[22] Herrick v. Woolverton, 41 N. Y. 581; Crim v. Starkweather, 88 N. Y. 339; Furman v. Haskin, 2 Caines, 369; Loomis v. Pulver, 9 Johns. 244; Ranger v. Cary, 1 Metc. (Mass.) 369; Cromwell v. Arrott, 1 Serg. & R. 180. It is to be noted that the term "with interest" does not vary this construction as to the maker or acceptor. Herrick v. Woolverton, supra; Crim v. Starkweather, 88 N. Y. 339.

[23] Wethey v. Andrews, 3 Hill, 582; Sice v. Cunningham, 1 Cow. 397.

term of payment, otherwise a prolonged term of credit would have been expressed in the instrument. The transferee may thus be presumed to have inquired why the transferror did not exact cash from the maker or acceptor, as he might have done, instead of seeking to discount the instrument with him, and if there is any reason why this cash should not be paid the transferee is presumed to know it. This rule, however, applies only to the acceptor and maker. As its reasons show, it means only that the payee is allowed a reasonable time to exact of the acceptor or maker the payment of the bill or note when no time of payment is expressed, and that if the instrument is not presented for payment, but is transferred by the payee and subsequent holders, its transferee is put upon notice of their equities. The contract of the indorser is not affected by it, because the contract of the indorser is based upon different considerations. The notice of equities is confined to the contract of the maker or acceptor. The contract of the indorser is to pay the instrument, if, upon demand, the acceptor or maker does not. His liability accrues only upon the demand and refusal of the acceptor or maker to pay, and notice of dishonor to him.[24] And it is therefore immaterial whether the time at which this demand is made of the acceptor or maker is reasonable or unreasonable. It is sufficient to charge the indorser if demand be made of the acceptor or maker before the acceptor or maker is discharged by operation of the statute of limitations.[25]

In cases of instruments payable at sight, or at a certain time after sight, where presentment for acceptance is a prerequisite, presentment for acceptance is needed in order to determine the day of payment.[26] In case of instruments payable after demand, presentment must be made for the same reason. Here the same rule is adopted for the measure of time allowed for presentment as in case of the presentment for payment of bills and notes payable on

[24] Parker v. Stroud, 98 N. Y. 379; Merritt v. Todd, 23 N. Y. 28; Shutts v. Fingar, 100 N. Y. 539, 3 N. E. 588; Ferner v. Williams, 37 Barb. 10. It is to be observed that the words "with interest" make this a continuing security as to the indorser. Merritt v. Todd, 23 N. Y. 28.

[25] Shutts v. Fingar, 100 N. Y. 539, 3 N. E. 588.

[26] Mullick v. Radakissen, 9 Moore, P. C. 66, 28 Eng. Law & Eq. 86; Fry v. Hill, 7 Taunt. 397. And see cases cited supra, p. 321.

demand, namely, that such instruments must be presented within a reasonable time. The language of the cases implies a difference in the liability of the drawer and indorsers, though a sufficient reason for it does not appear. For it is said that otherwise the drawer or indorser will be discharged in case of presentment for acceptance, and that they have an interest in having the bill accepted immediately and paid according to the terms of the contract. It would be a wrong to subject them to indeterminate delay in the terms of payment which they have guarantied. For they might not be able to protect themselves by other means before it is too late, if the bill or note is not accepted, or accepted and paid, within the time of payment contemplated by them.[27] It would seem also that this rule applied also to cases of presentment of such instruments for their payment.

The exact application of the meaning of a reasonable time is not clear, for the question is as yet an unsettled one. It has been the subject of discussion in the courts. No absolute measure of this reasonable time has been fixed. The following times have been held reasonable: A day or two,[28] seven days,[29] a month;[30] the following unreasonable: Eight months,[31] three and one-half months,[32] two months and a half.[33] By some courts it is deemed a question of fact,[34] and the province of the jury to decide; by others,

[27] Allen v. Suydam, 20 Wend. 321; Aymar v. Berrs, 7 Cow. 705, and cases cited supra, p. 321.

[28] Field v. Nickerson, 13 Mass. 131–137. In this case it was held that "the condition on which the indorser is liable is that payment shall be demanded within a reasonable time, and the earliest notice possible given of refusal. This time may therefore vary according to the circumstances and situation of the parties, to be determined by the jury, under the direction of the court. It is impossible to fix any precise period."

[29] Thurston v. M'Kown, 6 Mass. 428.

[30] Ranger v. Cary, 1 Metc. (Mass.) 369.

[31] American Bank v. Jenness, 2 Metc. (Mass.) 288.

[32] Stevens v. Bruce, 21 Pick, 193.

[33] Losee v. Dunkin, 7 Johns. 70. See, also, collated cases Tied. Com. Pap. § 216, note.

[34] Wallace v. Agry, 4 Mason, 336, Fed. Cas. No. 17,096; Fry v. Hill, 7 Taunt. 397. In Muilman v. D'Eguino, 2 H. Bl. 553, the following was part of the opinion delivered by Eyre, C. J.: "I think, indeed, that the holder is bound to present the bill in reasonable time, in order that the period may

one of law, for the court to decide.[35] The better opinion would seem to be that it is a question for neither the jury nor the court to decide wholly, and yet a question in whose determination both the jury and the court must take part. "What is a reasonable time," said Judge Byles,[36] "depends on the circumstances of each particular case, and is a mixed question of law and fact, although reasonable time in general, and reasonable time for giving notice of dishonor in particular, is a question of law." In Muilman v. D'Eguino[37] Lord Chief Justice Eyre explains the meaning of this somewhat vague expression by saying that "what is a reasonable time must depend on the particular circumstances of the case; and it must always be for the jury to determine whether any laches is imputable to the plaintiff;" and the later cases have developed fully his meaning. That a reasonable time is a mixed question of law and fact means that the question is to be decided by the jury, under proper instructions from the court. It may vary much, according to the particular circumstances of each case. If the facts are doubtful or in dispute, it is the clear duty of the court to submit them to the jury; but, when they are clear and uncontradicted, then it is competent for the court to determine whether the time required by law for the presentment has been exceeded or not.[38]

commence from which the payment is to take place. The question what is reasonable time must depend on the particular circumstances of the case; and it must always be for the jury to determine whether any laches is imputable to the plaintiff." Fernandez v. Lewis, 1 McCord, 322; Nichols v. Blackmore, 27 Tex. 586; Barbour v. Fullerton, 36 Pa. St. 105.

[35] Aymar v. Beers, 7 Cow. 707; Edw. Bills & N. §§ 539–546; Sice v. Cunningham, 1 Cow. 397; Poorman v. Mills, 39 Cal. 345; Carll v. Brown, 2 Mich. 401; Sylvester v. Crapo, 15 Pick. 93.

[36] Wood's Byles, Bills, p. 183.

[37] Muilman v. D'Eguino, 2 H. Bl. 565.

[38] Prescott Bank v. Caverly, 7 Gray, 217. In the case of Moore v. Warren, 1 Strange, 415, it was held that, if the party who receives a goldsmith's bill tenders it the next day, it is not his loss if the goldsmith fails. As holding that the common usage in such affairs is to be regarded, see Turner v. Mead, Id. 416. In Manwaring v. Harrison, Id. 508, it was held that a person who did not demand a goldsmith's note in two days took the credit on himself. See, also, Coleman v. Sayer, 1 Barnard. 303. In the case of Hankey v. Trotman, 1 W. Bl. 1, Lee, C. J., held that "it is a question of fact whether there was convenient time allowed for receiving the money"; and Denison, J., was

Such being the rules with reference to the presentment for acceptance or payment of bills and notes payable at an uncertain time, contingent upon their being demanded or presented for sight or acceptance, it remains to speak of the rules regulating the presentment for payment of bills and notes due at a given time, at what time of day they are to be presented for payment, and the effect of the theory of grace in extending the time of the payment, as well as those payable at or after sight, beyond the time stipulated in the contract. The bills and notes payable at a given date, or at a given time after date, or after demand, or after sight, must be presented when by the terms of the contract they are due.[39] In general, this does not mean the day expressly stipulated in the contract, but it means that day with the additional days implied by the grace of the law merchant.

Lord Holt, in 1701, in Tassell v. Lewis,[40] thus expounds the rule: "In case of foreign bills of exchange, the custom is that three days are allowed for the payment; and, if they are not paid upon the last of the three days, the party ought immediately to protest the

of the opinion that "the question is whether the plaintiff has used a reasonable diligence or not. This the jury are to judge of." In Patience v. Townley, 2 J. P. Smith (Eng.) 223, it was held that where it was impossible to present the bill in due time, but where such bill was afterwards presented with due diligence, and was refused for want of due presentation, the holder might recover against antecedent parties. In Rickford v. Ridge, 2 Camp. 537, it was the opinion of Lord Ellenborough that "it is always to be considered whether, under the circumstances of the case, the cheque has been presented with due diligence. * * * It seems to me to be convenient and reasonable that cheques received in the course of one day should be presented the next."

[39] Thus, in the case of Anderton v. Beck, 16 East, 248, the plaintiff received on the 26th of December a bill due on the 28th, but kept it until the 29th, when he sent it for presentment. The bill was dishonored, and it was held that the plaintiff was guilty of laches in keeping the bill until the 29th. In Williams v. Smith, 2 Barn. & Ald. 496, it was held that the true rule is that a party, in order to avoid laches, must give notice by the next day's post. In the case of Pocklington v. Silvester, Chit. Bills (10th Ed.) 346, note 10, it was held to be established as a rule of law that a party receiving a check on a banker has the whole of the banking hours of next day in which to present such check for payment. As to the allowance of a reasonable time for presentment, by an administrator, of a bill found among papers of the deceased holder, see White v. Stoddard, 11 Gray (Mass.) 258.

[40] 1 Ld. Raym. 743.

bill and return it, and by this means the drawer will be charged. But, if he does not protest it on the last of the three days, which are called the 'days of grace,' then, although he upon whom the bill is drawn fails, the drawer will not be chargeable, for it shall be reckoned his folly that he did not protest. But if it happens that the last day of the said three days is a Sunday or a great holiday, as Christmas Day, upon which no money used to be paid, then the party ought to demand the money upon the second day; and, if it be not paid, he ought to protest the bill the second day; otherwise, it will be at his own peril, for the drawer will not be chargeable." This doctrine, thus declared to be the law merchant in case of foreign bills has been largely followed by courts of this country, and is probably the law, except when it is modified by statute. It is, however, very generally modified by statute. For as the common-law rule stands, since grace was a mere indulgence, and not a right, it was not extended beyond the term of indulgence allowed for grace. Thus, if grace expired on Sunday, the instrument would fall due on Saturday,[41] and if that Saturday was a public holiday the instrument would fall due on Friday.[42] But this has been changed by the statutes of the various states to the rule which governs bills or notes payable without grace, which allows payment on the next succeeding business day, because, the debtor not being compelled to do business or make payment on a holiday, the next day is the first legal time at which the creditor can demand payment.[43] These rules apply alike to foreign and inland bills and promissory notes,[44]

[41] Bussard v. Levering, 6 Wheat. 102; Kuntz v. Tempel, 48 Mo. 75; Barrett v. Allen, 10 Ohio, 426; Reed v. Wilson, 41 N. J. Law, 29. "When days of grace are allowed on a bill or note, and the third day falls on Sunday, the bill or note is payable on the previous Saturday." Per Bronson, J., in Salter v. Burt, 20 Wend. 205. In Bowen v. Newell, 8 N. Y. 190, it was held that whether days of grace should be allowed was dependent upon whether the instrument was payable on demand or at a future date.

[42] Story, Bills, § 338.

[43] Avery v. Stewart, 2 Conn. 69; Salter v. Burt, 20 Wend. 205; Colms v. Bank, 4 Baxt. 422; Sands v. Lyon, 18 Conn. 18.

[44] Bank of Washington v. Triplett, 1 Pet. 25; Ogden v. Saunders, 12 Wheat. 213; Brown v. Harraden, 4 Term R. 148; Cook v. Darling, 2 R. I. 385; Beck v. Thompson, 4 Har. & J. 531.

and to paper payable in installments, grace being allowed upon each installment.[45]

The day at which presentment for acceptance or for payment is to be made being fixed, the courts lay down a series of rules which are quite explicit in stating the hours of the day at which, under various circumstances, presentment for acceptance or payment is to be made. The general rule is that presentment should be made during usual and reasonable hours. With business men the legal meaning of "usual and reasonable hours" is any time during the proper hours of business. These vary, and generally range through the whole day to bedtime, in the evening.[46] They are classified as follows:

(1) Presentment at a bank should be during banking hours,[47] but if made after banking hours, to the proper authorities in the bank, it is sufficient.[48]

(2) Presentment at a place of business, during the usual business hours,[49] though a demand to any proper person at a place of business after business hours is sufficient.[50]

[45] Oridge v. Sherborne, 11 Mees. & W. 374.

[46] Cayuga Co. Bank v. Hunt, 2 Hill, 635.

[47] Elford v. Teed, 1 Maule & S. 28; Parker v. Gordon, 7 East, 385 (in this case it was held that if a bill be accepted payable at A's, who is the acceptor's banker, the party taking such special acceptance, which he is not bound to do, thereby impliedly agrees to present it for payment within the usual banking hours at the place where it is made payable); Staples v. Franklin Bank, 1 Metc. (Mass.) 43; Thorpe v. Peck, 28 Vt. 127.

[48] In the case of Salt Springs Bank v. Burton, 58 N. Y. 432, it was shown that, upon the day the note was due the indorser, being prepared to pay it, sent the maker to the bank during banking hours to ascertain the amount. The note was presented for payment, an hour after the close of banking hours, by the holder, to the cashier, and payment demanded. This was refused on the ground that there were no funds deposited for the purpose. It was held that the indorser was charged by such demand. And see Bank of Syracuse v. Hollister, 17 N. Y. 46; Bank of Utica v. Smith, 18 Johns. 230; Flint v. Rogers, 15 Me. 67; Crook v. Jadis, 6 Car. & P. 191; Commercial Bank v. Hamer, 7 How. (Miss.) 448; Cohea v. Hunt, 2 Smedes & M. 227; Shepherd v. Chamberlain, 8 Gray, 225; Bank of Utica v. Philips, 3 Wend. 408.

[49] Lunt v. Adams, 17 Me. 230; Wallace v. Crilley, 46 Wis. 577, 1 N. W. 301; Triggs v. Newnham, 1 Car. & P. 631; Strong v. King, 35 Ill. 9, Johns. Cas. Bills & N. 93.

[50] Henry v. Lee, 2 Chit. 124; Garnett v. Woodcock, 6 Maule & S. 44. In

(3) Presentment at one's residence between the usual hours of rising and retiring.[51] But it is sufficient if made upon the acceptor or maker personally at any time.[52]

In addition to this general classification, there are other considerations, depending largely upon the circumstances of each particular case. The principal ones are the usage of trade, and the location of the domicile of the person to whom presentment is to be made.[53] But the general principle underlying these considerations is that the person making the presentment should use due and proper diligence, and that the presentment should be made at such a time of day that the person expected to make the payment or give the acceptance, in the exercise of ordinary business prudence, cannot be supposed to have been taken off his guard or caught without funds. It is almost needless to add that presentment at an improper time, as a legal act, is a nullity.[54] And that the demand for payment may be made at any time within the proper period, although the acceptor or maker has the whole of the day to make the payment. If he is ready to pay on the same day after a demand has been made, at the proper time he must seek the creditor and tender payment.[55] The effect of the demand upon the liability of

this case a presentment of a bill of exchange at the banking house where payable, after banking hours, is sufficient if a person be stationed at the banking house, and return answer of "No orders."

[51] Salt Springs Bank v. Burton, 58 N. Y. 430; Nelson v. Fotterall, 7 Leigh, 179; Skelton v. Dustin, 92 Ill. 49. In the case of Barclay v. Bailey, 2 Camp. 527, it was held that the presentment of a bill of exchange for payment at the house of a merchant at 8 o'clock in the evening of the day it became due was sufficient to charge the drawer. Dana v. Sawyer, 22 Me. 244.

[52] Farnsworth v. Allen, 4 Gray, 453; King v. Crowell, Johns. Cas. Bills & N. 91.

[53] Notes to Bigelow, Cas. Bills & N. 246.

[54] Johnson v. Haight, 13 Johns. 470; Wiffen v. Roberts, 1 Esp. 261; Mitchell v. De Grand, 1 Mason, 176; Walsh v. Dart, 12 Wis. 635; Kohler v. Montgomery, 17 Ind. 220; Leavitt v. Simes, 3 N. H. 14. In the case of Dana v. Sawyer, 22 Me. 244, it was held that presentment at nearly midnight to the maker, after the latter had retired, would not be sufficient, unless there was a waiver, or unless it was shown that payment would not have been made on a demand at a proper hour.

[55] 1 Pars. 374; Rand. Com. Paper, § 1092.

the distinct contracts of the maker and acceptor and of the drawer and indorser will be examined subsequently.[56]

Place of Presentment.

The next step in our examination of the subject of presentment is the place where it is made. The underlying principles are much the same in case of presentment for acceptance and of presentment for payment, though in case of presentment for payment a very prominent element is that some place of payment is usually indicated in the instrument which becomes an important stipulation and term of the contract.[57] But if, in case of a bill, some place where the drawee is to be found to accept the bill appear on its face, the specific direction as to the place is a warranty or contract on the part of the drawer that a drawee shall be found at that place capable of accepting, and a presentment there is sufficient, although the place is closed,[58] or the drawee has never resided in the place named, or although, if addressed to a city or town generally, his exact place of residence is unknown.[59] This last rule is, however, disputed, the adverse cases[60] holding that the drawer should not be subjected to the penalties of dishonor by the chance absence of the drawee from the place indicated, but that the holder should make diligent inquiry for him, and seek to present the bill personally before he protests it.[61] However this may be, if no place is in-

[56] See post, pp. 341 et seq.

[57] In Hodge v. Fillis, 3 Camp. 463, it was held that, where a particular place of payment is denoted in a bill by both drawers and acceptors, it is a term of the contract between the parties, and that an averment that the bill was presented there for payment must be made. In Williams v. Waring, 10 Barn. & C. 2, it was held that a memorandum, in the margin of a note, that it is payable at a certain place, is not to be considered part of the contract, and presentment at that place need not be averred or proved. In Rowe v. Young, 2 Brod. & B. 165, it was held that, where a bill was accepted payable at a particular place, presentment at that place must be averred in an action against the acceptor.

[58] Anonymous, 1 Ld. Raym. 743; Wolfe v. Jewett, 10 La. 383; Ratcliff v. Planters' Bank, 2 Sneed, 425.

[59] Union Bank v. Fowlkes, 2 Sneed, 555.

[60] Bank of Washington v. Triplett, 1 Pet. 25, 34; Wiseman v. Chiapella, 23 How. 368–377.

[61] In the case of Bank v. Orvis, 42 Iowa, 691, it was held that, where the

dicated on the face of the bill for the presentment for its acceptance such presentment may be made either to the drawee personally,[62] or, this being impracticable, first at his place of business, and then at his place of residence, if that is known.[63] Of these two places, it is thought that the place of business should be first sought out by the holder,[64] and it is generally agreed that, if the drawee's place of business or residence cannot be ascertained, the holder may treat the bill as dishonored, and protest for non-acceptance, provided, always, that he uses due diligence to ascertain them.[65] In case of presentment for payment, the rules are governed by the same general principles. These rules are:

(1) If the instrument is made payable at a particular place, the presentment need not be personal, but is sufficient if made at the place stipulated.

(2) If no place of payment is stipulated, first at the maker's or acceptor's place of business, and then at his place of residence, and if, after due diligence, the maker or acceptor, or his place of business or of residence, cannot be found, then the bill or note may be treated as dishonored.

In the first of these rules the principle guiding the courts is that the acceptor or maker has contracted to have funds to pay the instrument when due at a particular place, and this contract the indorser has ratified. The holder has a right to rely upon this con-

maker of a note has no place of business, a demand made at his place of residence is sufficient, even though he is not at home.

[62] Mason v. Franklin, 3 Johns. 201.

[63] Anderson v. Drake, 14 Johns. 113. In this case, Thompson, C. J., said: "I am inclined to think that where a note is not made payable at any particular place, and the maker has a known and permanent residence within the state, the holder is bound to make a demand at such residence in order to charge the indorser."

[64] Tied. Com. Paper, § 213. "I have no doubt, where a person has an office or known and settled place of business for the transaction of his moneyed concerns, * * * a presentment and demand at that place (as well as a presentment and demand at his residence) is good in law." Dayton, J., in Sussex Bank v. Baldwin, 17 N. J. Law, 488.

[65] Bateman v. Joseph, 12 East, 433; Freeman v. Boynton, 7 Mass. 483; Collins v. Butler, 2 Strange, 1087; Browning v. Kinnear, 1 Gow, 81; Hine v. Allely, 4 Barn. & Adol. 624. In this case the bill was taken to the proper place, but the house was closed.

tract in taking the instrument, and therefore his duty is fulfilled if he is ready with the instrument to receive payment of it at the place stipulated. The question involved in the second rule is to formulate the degree of diligence which is necessary for a holder to exercise to charge an indorser in endeavoring to procure payment of the instrument from the acceptor or maker.[66] And thus the facts to be kept in mind are the express stipulation of contract, in the first instance, and, in the second, the degree of diligence necessary for the holder to avail against the right of the indorser to insist upon a presentment to hold him as a surety. When a place of payment is stipulated in the bill or note, presentment for payment is sufficient to charge all parties with liability, if made when the instrument is due at the place stipulated.[67] The presentment need not be personal.[68] The holder's part of the contract is performed if he, or any one for him, is at the place of payment with the paper, so that he may receive the money.[69] The mere presence of the instrument at the place of payment is enough.[70] By "place of payment" is meant either the particular place stipulated as an office, house,[71] or bank,[72] or the city or town stipulated,[73] provided per-

[66] "The general rule that payment must be demanded from the maker of a note, and notice of its non-payment forwarded to the indorser within due time, in order to render him liable, is so firmly settled that no authority need be cited in support of it. * * * Due diligence to obtain payment from the maker is a condition precedent, on which the liability of the indorser depends." Marshall, C. J., in Magruder v. Union Bank, 8 Curt. Dec. 299, 3 Pet. 87. See, also, Cundy v. Marriott, 1 Barn. & Adol. 696.

[67] Harris v. Packer, 3 Tyrw. 370; Saunderson v. Judge, 2 H. Bl. 509; Buxton v. Jones, 1 Man. & G. 83; Bank of the Metropolis v. Breut, 2 Cranch, C. C. 530, Fed. Cas. No. 900; Gale v. Kemper, 10 La. 205. In the case of Saunderson v. Judge, 2 H. Bl. 509, it was held by the court that: "It is not necessary that a demand should be personal. It is sufficient if it be made at the house of the maker of the note; and it is the same thing, in effect, if it be made at the place where he appoints it to be made."

[68] Nichols v. Goldsmith, 7 Wend. 162; Gillett v. Averill, 5 Denio, 85.

[69] Woodin v. Foster, 16 Barb. 146.

[70] Bank of Syracuse v. Hollister, 17 N. Y. 46; Merchants' Bank v. Elderkin, 25 N. Y. 178.

[71] Philopott v. Bryant, 3 Car. & P. 244.

[72] Chicopee Bank v. Philadelphia Bank, 8 Wall. 641.

[73] Meyer v. Hibsher, 47 N. Y. 265.

haps, in the last case, that the holder make a reasonable inquiry for the acceptor's or maker's address in the city or town, and cannot find it.[74] The stipulation fixing a place of payment may be in writing, and created in a bill, either by the drawer making it payable at a particular place, or by like act of the acceptor, provided his acceptance does not change the tenor of the bill.[75] It may be created in writing in a note by the maker specifying the place at the time of execution. It may also be created by parol agreement of the parties if it does not change a written stipulation in the bill or note.[76] And it may specify several places, and designate any of them as the place of payment of the instrument.[77] If payment is to be made at any one of several places, presentment may also be made at any one of them, or presence of the instrument at any one of them is sufficient. This is because the aim of the theory of negotiability is to put the least possible burden upon the holder. This stipulation is for his benefit. And the maker or acceptor, who is party to such a stipulation, must be ready to pay the instrument at any and all of the places named as places of payment in it.

When a bill or note is not made payable at any particular place, the general rule of law is that, in order to charge the indorser, payment must be demanded of the maker personally, or, if not personally, at his place of business, or at his dwelling place or other place of abode.[78] This is a rule which can be acted upon in the majority

[74] Rand. Com. Paper, § 1114; Daniel, Neg. Inst. § 640.

[75] Chalm. Dig. art. 166; Foden v. Sharp, 4 Johns. 183; Troy City Bank v. Lanman, 19 N. Y. 477; Niagara Dist. Bank v. Tool Manuf'g Co., 31 Barb. 403; Blair v. Bank of Tennessee, 11 Humph. 84.

[76] Thompson v. Ketcham, 4 Johns. 285; Meyer v. Hibsher, 47 N. Y. 265; Pearson v. Bank of Metropolis, 1 Pet. 89; State Bank v. Hurd, 12 Mass. 172.

[77] Beeching v. Gower, 1 Holt, N. P. 313. This was a case where a banker's promissory note was made payable at Tunbridge and also at London. The holder had a right to present it at either place, and if payment were refused in London it would be no evidence of laches on the part of the holder to prove that, if payment had been demanded at Tunbridge, the nearer and more convenient place, the bill would have been paid. Daniel, Neg. Inst. §§ 648–650; Tied. Com. Paper, § 314.

[78] Taylor v. Snyder, 3 Denio, 145; Holtz v. Boppe, 37 N. Y. 634; Gates v. Beecher, 60 N. Y. 518; Meyer v. Hibsher, 47 N. Y. 265; Cox v. National Bank, 100 U. S. 713; Mitchell v. Baring, 10 Barn. & C. 11; Barnes v. Vaughan, 6 R. I. 259; Farmers' Bank v. Duvall, 7 Gill & J. (Md.) 78; Moore v. Waitt, 13 N.

of instances, because a presentment can be made at one of these places. But the rule is not without exception. Under various circumstances, a demand in any form may be dispensed with. The test is whether due diligence to make a demand has been made, and if a demand is found to be impracticable, proper efforts for that purpose having been made, the indorser will still be liable, notice having been given him by the holder. Instances of this exception are when the acceptor or maker has absconded,[79] or is a seaman on a voyage,[80] or has no known place of residence or of business,[81] or after the giving of the note or bill, and before its maturity, the maker or acceptor has removed from the state or country.[82] In all of these instances a presentment and demand are excused. The reason of the rule is due diligence, and, where no place of payment is stipulated in the note, due diligence means what is consistent with ordinary business practice. Experience warrants the position that ordinary business practice and due diligence are the same.

H. 415; Sussex Bank v. Baldwin, 17 N. J. Law, 487; Draper v. Clemens, 4 Mo. 52. In the case of Barnes v. Vaughan, 6 R. I. 259, it was held by Bosworth, J., that, "if no place of payment is named in the note, at which the note is payable, it is necessary to present the note to the maker personally, or at his place of abode or business, before the indorser can be made chargeable." See, also, Cheek v. Roper, 5 Esp. 105.

[79] Putnam v. Sullivan, 4 Mass. 45–53; Lehman v. Jones, 1 Watts & S. (Pa.) 126; Ratcliff v. Planters' Bank, 2 Sneed, 425.

[80] Barrett v. Wills, 4 Leigh, 114. In Dennie v. Walker, 7 N. H. 199, it was held by Upham, J., that "a removal beyond the bounds of the government, after the making of a note, and before it comes due, and where no place of payment of the note is specified, renders a demand upon the maker unnecessary; but this is an exception to the general rule, and must be construed strictly."

[81] Whittier v. Graffam, 3 Greenl. 82; Duncan v. McCullough, 4 Serg. & R. 486. "If the maker has no known residence or place, the holder will be excused from making any demand whatever. So, if in the intermediate period between the time when the note was made and when it becomes due the maker has removed his domicile or place of business to another state. * * * It will, in such case be sufficient to present the note at his former residence or place of business." Per Wright, J., in Adams v. Leland, 30 N. Y. 309. To the same effect, see Erwin v. Adams, 2 La. 318; Sands v. Clarke, 8 C. B. 751.

[82] McGruder v. Bank of Washington, 9 Wheat. 598; Gillespie v. Hannahan, 4 McCord, 503; Reid v. Morrison, 2 Watts & S. 401; Wheeler v. Field, 6 Metc. (Mass.) 290; Central Bank v. Allen, 16 Me. 41; Grafton Bank v. Cox, 13 Gray, 503.

Where no place of presentment or payment is specified, due diligence would require that the instrument be presented where there might be supposed to be some one to care for it.[83]

The foregoing general statements as to the place of presentment are to be qualified by the other statement that their main importance is in their application to the enforcement of the contract of the drawer or indorser. A failure to present does not relieve the acceptor or maker from the principal debt, but does discharge the drawer and indorsers. His liability as a surety is strictissimi juris, and must be enforced according to the letter of the contract. The due diligence the holder owes to him is only satisfied by presentment at the place where it is to be presumed that funds have been provided to meet the bill or note at maturity.[84] And, if no place is specified, then a reasonable effort on the part of the holder to collect the paper of the maker or acceptor in ways which the law itself has prescribed and pointed out. This topic will be amplified in a subsequent section of this chapter.

SAME—BY WHOM AND TO WHOM MADE—EFFECT OF FAILURE TO PRESENT AND PROTEST.

141. Presentment must be made by the lawful holder, or his authorized agent, to the drawee, acceptor, or maker, or his authorized agent.

142. A failure to make due presentment for acceptance, when it is incumbent on the holder to make the same, de-

[83] Woodworth v. Bank of America, 19 Johns. 391; Meyer v. Hibsher, 47 N. Y. 265.

[84] Bank of U. S. v. Smith, 11 Wheat. 171; Watkins v. Crouch, 5 Leigh, 522; Ferner v. Williams, 37 Barb. 9; Parker v. Stroud, 98 N. Y. 379; Brown v. Jones, 113 Ind. 46, 13 N. E. 857. Where a bill is drawn payable at a particular place, and the drawee accepts it payable at that place, in an action against the drawer, presentment to the acceptor at that place must be proved. Gibb v. Mather, 8 Bing. 214. An acceptance which makes a bill payable at a different place from that in which the drawee has his residence is a material departure from the tenor of the instrument, and presentment for payment at the place in which it is made payable by the acceptance, will not charge the drawer. Niagara Bank v. Fairman & W. Mach. Tool Manuf'g Co., 31 Barb. (N. Y.) 403.

prives him of his remedy both on the bill itself and on the consideration for which it was given.

143. A failure to present a bill or note for payment at the proper place or time—

(a) Relieves the acceptor or maker from payment of further interest and costs of suit, if he was ready with funds to meet the bill or note at the stipulated time and place of payment, but not from the principal sum of the bill or note.

(b) It discharges the drawer and indorsers from liability.

144. Upon presentment of a bill for acceptance, or of a bill or note for payment, and a refusal to accept the bill or to pay the bill or note, notice of its dishonor must be given to the drawer of the bill, and to the indorsers of the bill or note. It is usual to protest it, though this is necessary only with foreign bills.

In concluding the subject of "Presentment," and before taking up the subject of "Dishonor," it remains to mention the person to whom and by whom a bill may be presented for acceptance, or a bill or note may be presented for payment, the effect of the failure of the holder to present the instrument for acceptance and for payment, and the proceeding proper to be followed in case acceptance or payment is refused.

By Whom.

Presentment should be made by the lawful holder or by his duly-authorized agent.[85] The meaning of "a lawful holder" is determined by principles already given.[86] Where the instrument is payable to bearer or indorsed in blank, both in case of presentment

[85] Bank of Utica v. Smith, 18 Johns. 230; Freeman v. Boynton, 7 Mass. 483; Agnew v. Bank of Gettysburg, 2 Har. & G. 478; Leftley v. Mills, 4 Term R. 170; Bachellor v. Priest, 12 Pick. 399; Sussex Bank v. Baldwin, 17 N. J. Law, 487. Thus, in the case of Ocean Bank v. Williams, 102 Mass. 141–143, it was held that a presentment and demand of payment made by a notary's clerk or deputy was not sufficient.

[86] See supra, pp. 180 et seq.

for acceptance and of presentment for payment, the rule is that the drawee in case of acceptance, and the acceptor or maker in case of payment, is bound to consider the person in possession of the bill or note, with the ostensible legal title to it, as the person lawfully entitled to make the presentment and demand. This ostensible legal title is shown by the possession of the instrument. Where the instrument is indorsed in full, for reasons already given, it must be presented by the indorsee. Where, however, the instrument is unindorsed by the payee or indorsed in full, and not in the possession of the indorsee, then the person to whom it is presented is put upon his inquiry. If, without inquiry, he accepts and pays, it is at the risk of repayment, if he does not pay the true owner. The possessor certainly cannot be deemed, as is sometimes said,[87] to be the agent of the true owner by virtue of his possession.[88] Though this last position is modified by the rule that if it appears conclusively that the omission to indorse was through inadvertence, and that, although not indorsed, the instrument was transferred to the holder before maturity, for a valuable consideration, then such an instrument is in the possession of some party from whom it is proper to accept it, or to whom it is proper to pay it.[89]

The agent making the presentation is generally, but not necessarily, a notary public. A notary public is chosen to make presentment for purpose of protest. The distinction between presentment and protest is that presentment is the placing the bill so that those liable upon it can have it at hand to accept it or to pay it when due, but protest is an official act, held necessary in case of foreign bills to charge the indorsers. Any person who is the lawful holder of the instrument may make a presentment. And while it is also true that any reputable citizen, in the absence of a notary public in the town or place, may make a protest, nevertheless the custom is practically limited to notaries public, because it is only the certificates or manifests of notaries public which by the statutes of the several states have been declared to be prima facie evidence of the facts contained in them.[90] But, aside from the

[87] Daniel, Neg. Inst. § 573.

[88] Doubleday v. Kress, 50 N. Y. 413.

[89] Franklin Bank v. Raymond, 3 Wend. 69.

[90] In the case of Langenberger v. Kroeger, 48 Cal. 149, it was held that,

fact of protest, any person duly authorized may make a presentment,[91] although it is doubtful, in case of payment of an instrument specially indorsed, whether or not the maker or acceptor may require a written authority or an indorsement to the agent before being compelled to make payment.[92]

To Whom.

Subject to the provisions stated in the last sections of this chapter, a presentment must be made to the drawee or acceptor of a bill, or to the maker of a note, or to an authorized agent.[93] In case of acceptance, the presentment must be made to the drawee in person, if he be alive and can be found.[94] If he cannot be found, then inquiry should be made for some person authorized to accept for him, though it should be always kept in mind that it is incumbent on the plaintiff to prove that the agent was authorized to accept or refuse acceptance.[95] If the drawee is dead, the better opinion is that at once there may be a protest for non-acceptance.[96] In case of presentment for payment, if there is a stipulation for the payment of the instrument at any particular place, presentment should be made to the drawee, acceptor or maker, if he is to be found at the place of payment; if not, then presentment should be made to any person of discretion who can be found. It is the

where it was not specified in the instrument in what kind of money the draft was payable, a demand for payment in gold would not charge the drawer.

[91] Merchants' Bank v. Spicer, 6 Wend. 443; Baer v. Leppert, 12 Hun, 516; Hartford Bank v. Barry, 17 Mass. 94; Shed v. Brett, 1 Pick. 401, 413; Seaver v. Lincoln, 21 Pick. 267; Hartford Bank v. Stedman, 3 Conn. 489.

[92] See Tied. Com. Paper, § 311, and cases cited. Contra, Daniel, Neg. Inst. § 572, and cases cited.

[93] In the case of Brown v. Turner, 15 Ala. 832, it was held that, where a bill was accepted by two partners, demand of payment made of the agent of one of them, in the absence from the city of both partners, was sufficient to charge the drawer.

[94] Cheek v. Roper, 5 Esp. 175. In this case it was held that, in order to charge the drawer of an unaccepted bill, some actual evidence of a demand to accept on the drawee must be proved. It is not sufficient to call at the residence of the drawee, and for an acceptance to be refused by a person who was unknown by the one making the demand.

[95] Nelson v. Fotterall, 7 Leigh, 180; Stainback v. Bank of Virginia, 11 Grat. 260.

[96] Tied. Com. Paper, § 212; Daniel, Neg. Inst. § 459.

duty of the acceptor or maker to have funds at that place, and a person on the premises who may be reasonably supposed to know of them or to have charge of them is a proper person to whom to make a presentment.[97] If no place is stipulated, then presentment must be made either to the acceptor or maker personally, or at his place of business or of residence, for reasons already given.[98] And in making presentment in these ways the principles enunciated also apply. If the maker or acceptor is dead, presentment should be made to his personal representative, if one can be found.[99] But if none has been appointed, then at the acceptor's or maker's former place of residence.[100]

Effect of Failure to Present.

A failure to present for acceptance is, in general, unimportant.[101] But in case of bills payable at or after sight, transferred as col-

[97] Matthews v. Haydon, 2 Esp. 509; Sanford v. Norton, 17 Vt. 285; Draper v. Clemens, 4 Mo. 52; Phillips v. Poindexter, 18 Ala. 579; Bank of England v. Newman, 12 Mod. 241. In this case it was held that a demand of a servant of the drawer, who used to pay money for him, was a good demand. Whaley v. Houston, 12 La. Ann. 585.

[98] See supra, pp. 336 et seq. In the case of Barnes v. Vaughan, 6 R. I. 259, no place was named in the note in question, and it was held that payment must be demanded from the maker in person, or at his place of business or residence; on the last day of grace. A notice sent by the bank where a note has been left for collection, stating the fact that the bank holds the note, and stating the day of payment, and given before maturity, is not a sufficient demand.

[99] Magruder v. Union Bank, 3 Pet. 87. The decision in this case was to the effect that the fact that the indorser of a note took out letters of adminstration on the estate of the maker, who died before it became due, did not free the holder from the duty of demanding payment, and of giving notice to the indorser. Gower v. Moore, 25 Me. 16; Juniata Bank v. Hale, 16 Serg. & R. 167. In this case the maker of the note was shown to have died before it became due. Letters of administration upon the estate were taken out by the indorsers, among others, before maturity of the note. It was held that, notwithstanding these facts notice of the maker's non-payment must be given to the indorsers. Groth v. Gyger, 31 Pa. St. 271.

[100] Magruder v. Union Bank, 3 Pet. 87; Juniata Bank v. Hale, 16 Serg. & R. 167; Price v. Young, 1 Nott & McC. 438; Gower v. Moore, 25 Me. 16.

[101] See supra, pp. 321 et seq.

lateral security,[102] or in payment of the holder's debt,[103] presentment for acceptance is vital. For, as has been seen,[104] it is the duty of the holder of such bills either to negotiate them away or to present them for acceptance within a reasonable time, else the drawer and prior indorsers are discharged.[105] This duty binds the transferee, and he must in turn present the paper for acceptance or negotiate it away. Hence the rules already given[106] do not apply to such a transferee, and he is not allowed to treat the instrument as a suspension of the indebtedness, and to sue upon the original consideration, upon returning to the debtor the bill, from which the drawer and indorser are discharged by reason of his own negligence. He has made the paper his own so as to substitute the parties to it his debtors in place of his original debtor, and he has discharged the original debtor from all liability, whether the paper is in fact paid or not.[107] The loss must fall upon his shoulders, and not that of the debtor, for a bill rendered nugatory in many of its important particulars is treated as a discharge or payment of the original debt. This rule applies also in case of the laches of the original creditor in presenting for payment a bill or note transferred to him by his debtor, or in obtaining the payment of instruments so transferred in ways from which loss or injury ensue.[108]

[102] Dayton v. Trull, 23 Wend. 345.

[103] In the case of Smith v. Miller, 43 N. Y. 174, it was held by Allen, J., that "a creditor may so deal with negotiable securities received from his debtor for collection, and to be placed to his credit when paid, as to discharge the debtor from all liability. * * * Laches which would discharge the drawer or indorser of a bill of exchange will as effectually extinguish the debt for payment of which a bill or other negotiable instrument is transferred."

[104] See supra, pp. 321 et seq.

[105] Mellish v. Rawdon, 9 Bing. 416; Ramchurn v. Radakissen, 9 Moore, P. C. 46; Wallace v. Agry, 4 Mason, 336, Fed. Cas. No. 17,096; Strong v. King, 35 Ill. 9; Goupy v. Harden, 7 Taunt. 163. In Goupy v. Harden it was held by Gibbs, C. J., that there was no laches in putting a foreign bill payable after sight, into circulation before acceptance and to keep it circulating so long as the convenience of the successive holders requires.

[106] See supra, pp. 321 et seq.

[107] People v. Cromwell, 102 N. Y. 477, 7 N. E. 413; Smith v. Miller, 43 N. Y. 171; Southwick v. Sax, 9 Wend. 122.

[108] Jones v. Savage, 6 Wend. 658; Tobey v. Barber, 5 Johns. 68; Chamber-

The principal point of importance to be noted in the case of the failure of the holder to present a bill or note for payment at the proper place or time is the difference in its effect upon the contract of the acceptor and maker, and that of the drawer and indorsers. As far as the maker and acceptor are concerned, the place and time of payment embodied in an instrument are looked upon merely as memoranda of the place where and time when payment is to be demanded, and not as part of the contract otherwise essential. The maker or acceptor is liable everywhere and at all times within the statute of limitations, and, as against him, the bringing of the action is a sufficient demand.[109] The right of action always subsists so long as the instrument is unpaid. The place and time of payment, however, are so far important that, if the maker or acceptor were there then, with his money to pay the instrument, it is looked upon much as a tender would be in the case of an ordinary debt. The holder may recover from him at any time the amount of the instrument,[110] but not interest, by way of damages, for his failure to pay.[111] In other words, the non-attendance of the holder with the instrument at the time and place of payment can produce no worse consequences to him than if he had attended, and the acceptor or maker had also been present, and tendered the money, which the holder had refused to accept.[112] Of course, with this must be coupled the other principle governing the law of tender,—that, for the maker or acceptor to preserve his rights, the tender must be kept good. The funds must

lyn v. Delarive, 2 Wils. 353; Hebden v. Hartsink, 4 Esp. 46; Camidge v. Allenby, 6 Barn. & C. 373; Adams v. Darby, 28 Mo. 162; Gracie v. Sandford, 9 Ark. 238. In Kearslake v. Morgan, 5 Term R. 513, it was held that a plea in assumpsit that the defendant (who was the payee of a promissory note) indorsed it to the plaintiff "for and on account of" the said debt was good.

[109] Rhodes v. Gent, 5 Barn. & Ald. 244; Jackson v. Packer, 13 Conn. 342; Armstrong v. Caldwell, 2 Ill. 546; Chillicothe Branch of State Bank v. Fox, 3 Blatchf. 431, Fed. Cas. No. 2,683; Blair v. Bank of Tennessee, 11 Humph. 83; Wegersloffe v. Keene, 1 Strange, 222; Rice v. Hogan, 8 Dana, 134.

[110] Bacon v. Dyer, 12 Me. 19; Armistead v. Armistead, 10 Leigh, 525; Mulherrin v. Hannum, 2 Yerg. 81; Hills v. Place, 48 N. Y. 520; Lazier v. Horan, 55 Iowa, 75, 7 N. W. 457.

[111] Phillips v. Franklin, Gow, 196; Murray v. East India Co., 5 Barn. & Ald. 204.

[112] Hills v. Place, 48 N. Y. 520.

be kept at the place of payment to pay the instrument at any time; for if the holder make a special demand afterwards, and the instrument be not paid, then his rights revive, and he becomes entitled to interest or damages from the time of the demand and also his costs of suit. This general rule does not apply to the drawer[113] or indorser.[114] He is not the principal debtor, but only a surety, whose liability is dependent upon the strict performance of the contract by the holder.[115] The place and time of payment for him are an essential part of the contract. The indorser is entitled to be at once apprised of the default of the maker, so that he may protect himself, both from the payment of interest as damages and of costs, by taking up the bill or note himself, and further may take steps to protect himself as against prior indorsers. The holder of the bill or note is held to a most strict compliance with its terms. Presentment either the day before or the day after the instrument became due will not avail. The loss or want of one day is [116] a palpable want of due diligence, which discharges the indorser.

Notice of Dishonor.

After presentment for acceptance or payment has been made and refused, notice of dishonor must at once be given to the drawer and indorsers; otherwise they are discharged. The reason of the rule that a failure to give the drawer and indorsers notice of non-acceptances discharges them is that these parties may take prompt measures of self-protection; the drawer by withdrawing or withholding the further accumulation of effects in the hands of the drawee, and the indorsers by obtaining payment from the parties respectively liable to them.[117] The reason for the rule that failure to give a drawer and indorsers notice of non-payment discharges them is

[113] Munroe v. Easton, 2 Johns. Cas. 75; Burritt v. Tidmarsh, 5 Ill. App. 341.

[114] Magruder v. Union Bank, 3 Pet. 87; Ruddell v. Walker, 7 Ark. 457; Vanwickle v. Downing, 19 La. Ann. 83; Duncan v. McCollough, 4 Serg. & R. 480; Brandt v. Mickle, 28 Md. 436; Bank of Alexandria v. Young, 2 Cranch, C. C. 52, Fed. Cas. No. 858.

[115] Wolcott v. Van Santvoord, 17 Johns. 247; Parker v. Stroud, 98 N. Y. 379.

[116] Johnson v. Haight, 13 Johns. 470.

[117] Edw. Neg. Inst. § 619; Stewart v. Millard, 7 Lans. 373.

partly that given in the last paragraph, and partly because the contract of the drawer or indorser, as construed by the law merchant, depends upon two conditions, which are conditions precedent to the right of enforcement of the bill or note against the drawer or indorser. These are presentment to the drawee, acceptor, or maker, and a refusal on his part to pay, and secondly due notice to the drawer or indorser.[118] If, therefore, the holder fails to give the drawer or indorser due notice of non-payment, he fails to perform a condition precedent to his right of recovery upon the bill, and cannot enforce its payment against the parties who had a right to its performance. And this discharge acquits the drawer and indorser both of his liability upon the bill or note, and of his liability upon the consideration for its transfer. For, as was shown in case of failure to present for acceptance, the holder, by his neglect, has made the bill or note his own, and loss because of this neglect will fall upon him.[119]

Protest.

A usual preliminary to giving notice of dishonor of bill or note is its protest. A protest is defined as in form a solemn declaration

[118] Musson v. Lake, 4 How. (U. S.) 262; Rothschild v. Currie, 1 Q. B. 43.

[119] Jones v. Savage, 6 Wend. 659; Woodcock v. Bennet, 1 Cow. 711; Bridges v. Berry, 3 Taunt. 130. In this case the defendant was unable to pay a bill when due, which he had accepted. He obtained time, and indorsed to the plaintiff, as a security, a bill drawn by himself to his own order, which, when due, was dishonored by the drawee, but the holder omitted to give the defendant notice. It was held that by this laches the defendant was discharged, not only as indorser of the one bill, but also as acceptor of the other. In Peacock v. Pursell, 14 Q. B. (N. S.) 728, it was held that where A received from B, as collateral security for a debt, a bill drawn by C upon D, and at maturity failed to present it, he, by his laches, made the bill equivalent to payment, as between A and B. Where one drew a bill of exchange on a person to whom he had shipped goods on his own account, he is entitled to notice of dishonor, although in fact the drawee had not received the goods when the bill was presented for acceptance. Rucker v. Hiller, 16 East, 43. Brown v. Cronise, 21 Cal. 386; Green v. Cummins (Ky.) 6 Reporter, 524; Jennison v. Parker, 7 Mich. 355; Stam v. Kerr, 31 Miss. 199; Gale v. Walsh, 5 Term R. 239; Peacock v. Pursell, 14 Q. B. (N. S.) 728; Rucker v. Hiller, 16 East, 43, 3 Camp. 217. In Gale v. Walsh, 5 Term R. 239, it was held that, in an action against the drawer of a foreign bill of exchange, a protest for nonacceptance must be proved.

written by a notary under a fair copy of the bill or note, stating that acceptance or payment has been demanded and refused; the reasons for such refusal, if any, are assigned; and that the bill or note is therefore protested.[120] Its popular signification includes all the steps taken to fix the liability of a drawer or indorsers,[121] but its accurate technical meaning is that it is the testimony of some proper person, usually a notary, that the regular legal steps to fix that liability have been taken by the holder.[122] Its method is for the notary to himself properly present the instrument, and demand its acceptance or payment. If these are refused, to make a minute thereof on the instrument, or in his official record; the minute consisting of his initials, the year, month, and day of dishonor, and his charges. This is done on the day of the dishonor.[123] And on the same day, or afterwards, the notary extends the protest thus noted by embodying in a certificate the facts of the protest, and his acts in making presentment, demand, and in giving notice of dishonor. To this he generally appends his official seal.[124] This certificate is generally accepted as evidence of the facts set forth in its terms, and its production obviates the necessity of proof of these facts by witnesses in open court. The main purpose of the protest, therefore, is to furnish to the holder legal testimony of presentment, demand, and notice of dishonor, to be used in actions against the

[120] Byles, Bills, p. 263.

[121] Townsend v. Lorain Bank, 2 Ohio St. 345; Wolford v. Andrews, 29 Minn. 251, 13 N. W. 167.

[122] Ocoee Bank v. Hughes, 2 Cold. (Tenn.) 52.

[123] In the case of Chaters v. Bell, 4 Esp. 48, Lord Kenyon was of the opinion that protest might be made at a future time, if a bill were regularly presented and noted at the time of demand and refusal of payment. It was said by Grier, J., in Dennistoun v. Stewart, 21 Curt. 722, 17 How. 606, that "a protest, though necessary, need only be noted on the day on which payment was refused. It may be drawn and completed at any time before the commencement of the suit, or even before the trial, and consequently may be amended according to the truth, if any mistake has been made. The copy of the bill is connected with the bill certifying the formal demand by the public officer, as the easiest and best mode of identifying it with the original."

[124] Daniel, Neg. Inst. § 927. For detailed statement of protest, and authorities, see Byles, Bills, c. 19; Daniel, Neg. Inst. c. 28; Rand. Com. Paper, c. 34; Tied. Com. Paper, c. 17.

drawer and indorsers.[125] And this purpose is the reason for the following rules:

(1) A foreign bill must be presented by a notary public,[126] because, from the needs of the case, some act of a universally recognized authority is called for. By force of custom, the official act of the notary public is of recognized authority throughout the world. It is deemed to afford satisfactory evidence of dishonor to the drawer and indorsers, who from their residence abroad might experience a difficulty in making proper inquiries on the subject, and be compelled to rely on the representation of the holder. By the common law, also, in case of a foreign bill, a notary's protest is competent evidence of such fact, alike in cases of protests for non-acceptance or non-payment and for better security.[127]

(2) Protest by notaries public of a foreign note is unnecessary, unless it is indorsed; but, if indorsed, its protest by a notary public, according to the weight of authority, is required, because the indorsement of a note is essentially a bill drawn on the maker.[128]

(3) An inland bill or promissory note, whether inland or foreign, provided it be unindorsed,[129] not being originally within the rules of the law merchant, is not subject to the operation of this rule. Statutes in most of the states have, however, sanctioned the practice of a notary public's presenting the paper by putting his certificate on the same footing with that of a notary public presenting a foreign bill of exchange. It is true, also, that in case of inland bills and promissory notes, it is a common practice for a notary public to be employed to make demand of payment of inland bills and promissory notes from the acceptors and makers, and also to give notice of the dishonor to the indorsers thereon. But this is a

[125] Swayze v. Britton, 17 Kan. 629; Walker v. Turner, 2 Grat. 536; Commercial Bank v. Varnum, 49 N. Y. 269; Halliday v. McDougall, 20 Wend. 80; Dennistoun v. Stewart, 17 How. (U. S.) 606.

[126] Union Bank v. Hyde, 6 Wheat. 572; Borough v. Perkins, 1 Salk. 131; 2 Ld. Raym. 992; Carter v. Union Bank, 7 Humph. 548. As to whether demand of payment of a foreign bill may be made by a notary's deputy, see Carter v. Union Bank, 7 Humph. 548.

[127] Halliday v. McDougall, 20 Wend. 80.

[128] Carter v. Burley, 9 N. H. 558; Ticonic Bank v. Stackpole, 41 Me. 302; Piner v. Clary, 17 B. Mon. 645.

[129] Bonar v. Mitchell, 19 Law J. Exch. 302.

mere matter of convenience and arrangement between the holder and the notary, and is by no means a requisite imposed or recognized by law as binding upon the holder.[130] Even after protest, it is no necessary part of the official duty of a notary to give notice to the indorsers of the dishonor of a promissory note, although certainly it is a very convenient and useful course in the transactions of such affairs in commercial cities.[131] In this connection it is proper to add the additional disconnected principles: That the states of the Union, as regards each other, are foreign states, and that, when it is sought to charge non-residents, the intervention of a notary public is necessary.[132] And that if no notary can be conveniently found, the bill may be protested by any reputable citizen of the place where the bill is dishonored.[133] When protested by a private citizen, the rule that protest must be made in the presence of two witnesses is probably obsolete.[134]

NOTICE OF DISHONOR.

145. NOTICE OF DISHONOR—Is bringing, either verbally or by writing, to the knowledge of the drawer or the indorser of an instrument, the fact that a specified negotiable instrument, upon proper proceedings taken, has not been accepted, or has not been paid, and that the party notified is expected to pay it.

146. Notice must be given as follows:

(a) By the holder of the instrument, or by any person upon whom a liability is fixed to any person upon whom it is sought to fix a liability.

(b) Between parties residing in the same place, either by giving it personally, verbally or

[130] Bailey v. Dozier, 6 How. 23.

[131] Dickens v. Beal, 10 Pet. 582; Morgan v. Van Ingen, 2 Johns. 204; Miller v. Hackley, 5 Johns. 384.

[132] Commercial Bank v. Varnum, 49 N. Y. 269.

[133] Burke v. McKay, 2 How. 66; Read v. Bank of Kentucky, 1 T. B. Mon. 91.

[134] Daniel, Neg. Inst. § 934a.

in writing, or by leaving a written notice at the residence or place of business of the party to be charged; between parties residing in different places, by depositing in the post office, postage paid, a written notice, properly addressed to the person to be charged.

(c) Within one day after an unqualified refusal to accept the bill or pay the instrument, or by an indorser within one day after he has received notice of his own liability. This means in proper business hours between co-residents, and, when served on a non-resident, by or before the last post, if there be one the next day, if not, in the first practicable mail thereafter.

According to Lord Denman,[185] the notice of dishonor is a part and parcel of the contract of the drawer and indorser, and not a step in the remedy at law of the holder to recover the amount of the bill or note. To repeat the substance of his words, the drawer and indorser contracts to pay the bill or note upon two conditions: One, the dishonor by the drawee, acceptor or maker on due presentment; the other, the due notification to him of such dishonor. And taking up the latter of these conditions, we purpose in this and the succeeding sections, first, to examine the necessary elements constituting this portion of the contract of the drawer and indorser, and then to classify and point out the persons and the methods by which it is carried into effect.

Sufficiency of Notice.

Probably the most important test of a notice of dishonor is whether or not the words bring home to the drawer or indorser the knowledge of the fact that he is legally charged with liability for the payment of the instrument.[186] He is entitled to know, first, of

[185] Rothschild v. Currie, 1 Q. B. 43.

[186] A letter from the holder to the indorser of a bill, threatening legal measures unless the bill be paid, does not amount to notice of dishonor of the bill

the breach of the condition to accept or to pay the instrument on the part of the drawee, maker or acceptor, and, second, that it sought to fix a liability for its payment upon him.[137] The first object of notice is therefore to inform the party to whom it is sent that acceptance or payment has been refused by the drawee, acceptor or maker; and the second, that as drawer or indorser he is liable, and that payment is demanded of him. The important question, then, is to determine what is due and proper notice. These words may be either in writing or verbal. That a verbal notice is proper seems settled both in New York and elsewhere.[138] No precise form of words is necessary to express this purpose, the rule being merely that the form of words used must be such as to convey legal notice to the party. In this a dis-

by the acceptor. Solarte v. Palmer, 1 Bing. N. C. 194. A bill of exchange, indorsed in blank, was left by the indorsee at the office of an attorney to be presented. On presentment by the attorney the bill was dishonored. The attorney wrote to the drawer on the following day, describing the bill, and stating that it had been dishonored, and subscribed his name and residence. This was held a sufficient notice of dishonor, though the attorney did not state in whose behalf he applied, nor where the bill was lying. Woodthorpe v. Lawes, 2 Mees. & W. 109. In Hedger v. Steavenson, Id. 799, the following letter from the plaintiff's attorney was held to be a sufficient notice: "Sir: I am desired by Mr. H. to give you notice that a promissory note for £99. 18s., payable to your order 2 months after the date thereof, became due yesterday, and has been returned unpaid; and I have to request you will please remit the amount thereof, with 1s. 6d. noting, free of postage, by return of post. I am, &c., J. S." In this case, Parke, B., said: "It seems to me enough if it appear by reasonable intendment, and would be inferred by any man of business, that the bill has been presented to the acceptor and not paid by him." The holder of a bill of exchange, on the day after it became due, called at the office of J., the drawer. The latter was busy at the time, and the holder sent him the following note: "B.'s acceptance to J., £500, due 12th January, is unpaid. Payment to R. & Co. is requested before 4 o'clock." This was held to be sufficient notice, following Parke, B., in Hedger v. Steavenson.

[137] Notice of dishonor in these words: "I hereby give notice that a bill for £50, at 3 months after date, by A upon and accepted by B, and indorsed by you, lies at" etc., "dishonored,"—was held sufficient without further intimation that plaintiff looked to defendant for payment. King v. Bickley, 2 Q. B. 419.

[138] Cuyler v. Stevens, 4 Wend. 566; Woodin v. Foster, 16 Barb. 146; Tindal v. Brown, 1 Term R. 167; Housego v. Cowne, 6 Law J. Exch. 110; Crosse v. Smith, 1 Maule & S. 545; Merritt v. Woodbury, 14 Iowa, 299; First Nat. Bank of Iowa City v. Ryerson, 23 Iowa, 508; Gilbert v. Dennis, 3 Metc. (Mass.) 495.

tinction is drawn between notice of dishonor and knowledge of dishonor. Throughout the cases the statement is common "that knowledge of the dishonor of a bill is not equivalent to notice of it."[139] This means that knowledge which is equivalent to notice, and which will make a drawer or indorser responsible, must be derived from some person entitled to call for payment. It must be information that the bill has been dishonored, and that the holder is in a position to sue him. In other words, the receipt of information by an indorser that an instrument is unpaid is not sufficient to fix his liability. There must be coupled with it information derived from some competent person, that he, the indorser, is looked to for its payment.[140]

The law in other respects has formulated certain elements for constituting a notice, and declares notices containing them sufficient to bring home to the knowledge of the drawer and indorser the fact that he is charged with legal liability. These elements are:[141] (1) That the notice contain a sufficient description of the instrument. (2) That the notice expressly or impliedly notify the drawer or indorser of the presentment, demand and refusal of the drawer, acceptor or maker to accept or to pay the instrument. (3) That the notice inform the drawer and indorser that the holder looks to him for payment, though this element is not indispensable to the legality of the notice.

Same—Identification of Instrument.

The common form of identification is to describe the instrument by date, amount, and parties, and state where it is awaiting payment; but any identification which, as a matter of fact, would indicate unmistakably to a business man of ordinary experience what instrument is to be paid, is sufficient.[142] This rule does not insist upon strict

[139] Juniata Bank v. Hale, 16 Serg. & R. 157; Bank of Old Dominion v. McVeigh, 29 Grat. 559, 26 Grat. 852; Brown v. Ferguson, 4 Leigh, 37.

[140] Caunt v. Thompson, 7 C. B. 400; Miers v. Brown, 11 Mees. & W. 372.

[141] Artisans' Bank v. Backus, 36 N. Y. 100; Story, Prom. Notes, § 348; Daniel, Neg. Inst. § 973; Tied. Com. Paper, § 344; Glicksman v. Earley, 78 Wis. 223, 47 N. W. 272, and Johns. Cas. Bills & N. 200.

[142] Gill v. Palmer, 29 Conn. 54; Messenger v. Southey, 1 Man. & G. 76; Housatonic Bank v. Lafiin, 5 Cush. 546; Reynolds v. Appleman, 41 Md. 615; Mills v. Bank of United States, 11 Wheat. 431; Thompson v. Williams, 14 Cal.

technical accuracy. Its object is to enable the indorser notified to know exactly on what bill or note he has incurred liability, and the object of the inquiry of the court is to ascertain whether or not he has been apprised of this fact. The notice must state what the bill or note is,[143] and must not be calculated in any way to mislead the party to whom it may be given. It must not misdescribe the instrument, so that the defendant may perhaps be led to confound it with some other.[144] The description of the bill or note should be sufficiently definite to enable the indorser to know to what instrument in particular the notice applies; for an indorser may have indorsed many bills or notes of different dates, sums, and times of payment, and payable to different persons, so that he may be ignorant, unless the description in the notice is special, to which it properly applies or which it designates.[145] And in determining whether the description of the note or bill is sufficient, the circumstances of the case and the indorser's knowledge of these circumstances may be taken into consideration.[146] A notice which omits an essential feature of the indorsement or misdescribes it is an imperfect one, but is not necessarily invalid.[147] It is invalid only when it fails to give that

162; Tobey v. Lennig, 14 Pa. St. 483; Ross v. Planters' Bank, 5 Humph. 335; Wood v. Watson, 53 Me. 300; Snow v. Perkins, 2 Mich. 238; McCune v. Belt, 38 Mo. 291.

[143] Daniel, Neg. Inst. § 974. But see Hodges v. Shuler, 22 N. Y. 115.

[144] Story, Prom. Notes, § 349.

[145] Cook v. Litchfield, 9 N. Y. 279; Home Ins. Co. v. Green, 19 N. Y. 510.

[146] Daniel, Neg. Inst. § 976.

[147] In Harrison v. Ruscoe, 15 Mees. & W. 231, it was shown that a bill of exchange was drawn by H, indorsed by him to B, and by B to C, in whose hands it was dishonored. C's attorney gave notice in due time to A, but stated therein, by mistake, that he was directed by B (from whom he had no authority) to apply for payment of the bill. It was held that the notice of dishonor was sufficient, notwithstanding this misrepresentation, the only effect of which was to give A every defense against C that he would have had if the notice had really been given by B. In an action by the first indorsee of a bill against the drawer, it was proved that the plaintiff wrote a letter to the defendant, stating the bill to be dishonored, and requiring payment; but the letter misdescribed the bill as drawn by J. H. (the acceptor), and accepted by the defendant. Held, that this was sufficient notice of dishonor. Parke, B., said: "This notice is quite sufficient. It is not possible, under the circumstances, that the defendant could have been misled by it."

information which it would have given but for its particular imperfection. And even in case the notice in itself be defective, if, from the evidence of the attendant circumstances, it is apparent that the indorser was not deceived or misled as to the identity of the note, he will be charged.[148] It thus may become a question of fact whether or not from the contents of the notice itself and the extrinsic facts admitted into the case, knowledge of the dishonor was actually brought home to the indorser.[149] But this is only where there is doubt whether the indorser understood what particular instrument was dishonored. When there is no dispute as to the facts, the sufficiency of the notice is a question of law for the sole interpretation of the court.[150]

Same—Statement of Presentment, etc.

When there can be no doubt that the mind of the drawer or indorser identifies the bill or note which is unpaid, then the further question is whether the notice contained a statement of presentment, demand, non-acceptance or non-payment sufficient to comply with the rules of the law merchant. This is a question of law and of construction peculiarly the province of the court.[151] Some form of statement that the bill or note has been duly presented and dishonored is essential to establish the claim or right of the party giving notice, for otherwise he will not be entitled to any payment from the drawer and indorser.[152] Mere notice of the fact that the bill or note has not been paid affords no proof whatever that it has been presented in due season, or even that it has been presented at all. And if there be no statement of the dishonor of the bill or note, nor anything from which it can be fairly implied that due presentment has

[148] Carter v. Bradley, 19 Me. 62; Smith v. Whiting, 12 Mass. 6; Moorman v. State Bank, 3 Port. (Ala.) 353; Remer v. Downer, 23 Wend. 620.

[149] Hodges v. Shuler, 22 N. Y. 114.

[150] Cayuga Co. Bank v. Warden, 6 N. Y. 19; Dole v. Gold, 5 Barb. 494.

[151] Dole v. Gold, 5 Barb. 490.

[152] Lewis v. Gompertz, 6 Mees. & W. 402; Wilkinson v. Adam, 1 Ves. & B. 466; Boulton v. Welsh, 3 Bing. N. C. 688. Where the indorser of a note has died before the maturity of the note, notice must be sent to his executor, if such executor be known. Merchants' Bank v. Birch, 17 Johns. (N. Y.) 25. As holding that a notice of dishonor mailed with the address, "To the estate of H. O., deceased," will not be such notice as to charge the executor, see Massachusetts Bank v. Oliver, 10 Cush. (Mass.) 557.

been made, the notice is fatally defective.[153] Whatever will show dishonor is sufficient.[154] No particular form of notice is necessary. The holder is only required, in such language as he may adopt, to inform the indorser that the drawee, acceptor, or maker has neglected to accept or pay the bill or note; that the contingency on which the drawer's or indorser's promise to pay depended has happened, and that his liability has become absolute. The express statement of the facts of presentment, demand, and non-acceptance or nonpayment, in themselves, is unnecessary. These facts may be conveyed by express terms or by necessary implication.[155] "I should myself doubt," says Parke, B.,[156] "whether we could go so far as to say that it ought to appear upon the face of the notice, 'by express terms or necessary implication,' that the bill was presented or dishonored. It seems to me enough if it appear by reasonable intendment, and would be inferred by any man of business, that the bill had been presented to the acceptor, and not paid by him." And where no mercantile man, upon reading the notice, could possibly misunderstand its meaning, that is deemed within the meaning of reasonable intendment, and sufficient.

Thus the doctrine of reasonable intendment includes such terms as "dishonored," because that word includes presentment and demand,[157] or "protested,"[158] because that also shows presentment, demand, and refusal, or such other words coupled with a statement

[153] Page v. Gilbert, 60 Me. 488; Gilbert v. Dennis, 3 Metc. (Mass.) 495; Phillips v. Gould, 8 Car. & P. 355; Graham v. Sangston, 1 Md. 60; Lockwood v. Crawford, 18 Conn. 361; Sinclair v. Lynah, 1 Speer, 244.

[154] Rowlands v. Springett, 14 Mees. & W. 7; Shelton v. Braithwaite, 7 Mees. & W. 435; Ex parte Moline, 19 Ves. 216.

[155] Solarte v. Palmer, 1 Bing. N. C. 194. A letter written by the acceptor to the drawer on the same day on which the bill was presented for payment and was dishonored, in which the acceptor stated that he was unable to pay, and that the bill was in plaintiff's hands, was held to be sufficient notice, in the case of Rosher v. Kieran, 4 Camp. 87.

[156] Hedger v. Steavenson, 2 Mees. & W. 799.

[157] Stocken v. Collins, 9 Car. & P. 653; Woodthorpe v. Lawes, 2 Mees. & W. 109; Edmonds v. Cates, 2 Jur. 183; Smith v. Boulton, Hurl & W. 3.

[158] Mills v. Bank of U. S., 11 Wheat. 431; Cayuga Co. Bank v. Warden, 1 N. Y. 413; Grugeon v. Smith, 6 Adol. & E. 499; Everard v. Wilson, 1 El. & Bl. 801; De Wolf v. Murray, 2 Sandf. 166.

of non-payment as "Your bill is this day returned with charges," or "with charges or protested exchange." And a very good illustration of how the doctrine of reasonable intendment enlarges the rule is in the distinction between sufficient notice of dishonor of paper made payable at a bank or other particular place, and notice of dishonor of paper made payable at large.[159] If made payable at a bank or other particular place, it is the business of the maker or acceptor to have funds at that place when the paper becomes due. His failure to do so amounts to a dishonor, and it is sufficient to inform the indorser of this failure. No specific statement of demand and presentment is necessary. A statement to the indorser of non-payment, if it appears that the paper was at the bank at the time of its maturity, is sufficient, because such a statement can mean nothing else than the dishonor of the paper. If, on the contrary, the paper is payable at large, a statement of presentment and demand is necessary, because a personal demand of the maker is one prerequisite of dishonor.[160] Such expressions as "due and unpaid,"[161] "that the note remains unpaid,"[162] "notice of non-payment,"[163] have been held insufficient, because the fact alone that the acceptor or maker has not paid the instrument is immaterial to the liability of the indorser. The legal fact which fixes the indorser's liability is the demand of payment of the parties and the dishonor of the bill.[164] It is a better practice to state that the party holding the bill looks to the person notified for payment, but this in itself is not indispensable. The reason is that this is implied in the very act of giving notice.[165] Notice that acceptance or payment has been demanded of the drawee, maker, or acceptor and refused by him is

[159] See Bigelow, Bills & N. p. 277.

[160] Dole v. Gold, 5 Barb. 490.

[161] Gilbert v. Dennis, 3 Metc. (Mass.) 498.

[162] Pinkham v. Macy, 9 Metc. (Mass.) 174.

[163] Townsend v. Lorain Bank, 2 Ohio St. 355.

[164] Hartley v. Case, 4 Barn. & C. 339, 10 C. L. R. 606; Boulton v. Welsh, 3 Bing. N. C. 688, 32 C. L. R. 283; Strange v. Price, 10 Adol. & El. 125, 37 C. L. R. 88; Furze v. Sharwood, 2 Adol. & El. (N. S.) 388, 42 C. L. R. 726.

[165] Cowles v. Harts, 3 Conn. 517; Shrieve v. Duckham, 1 Litt. (Ky.) 194; Warren v. Gilman, 17 Me. 360.

sufficient to charge the drawer or indorser;[166] and it certainly cannot be argued that it is necessary to state what the law itself implies, —that the drawer or indorser is to be looked to to pay the instrument if the acceptor or maker does not pay it.[167]

By Whom Notice should be Given.

In pointing out the persons and process by which knowledge is brought home to the party to be charged with liability, the law follows principles analogous to those used in formulating the elements to be used in the notice itself. The aim is to establish a process such that a business man of ordinary experience, when proceeded against, would know that he would have to pay to the holder the amount of the instrument. The first element of this process is the rule, already alluded to, that to change knowledge into legal notice the fact of dishonor must be brought home to the party to be charged[168] by some person having an interest in enforcing the bill or note. Notice must be by a party or by some person authorized to give it. A notice by a mere stranger is not sufficient.[169] Properly authorized persons are an agent of the holder, who may give notice, because, in doing so, he represents and acts on behalf of his principal. A notary,[170] acting in his official character, is an example of this. An attorney is also such an agent,[171]

[166] Fitchburg Ins. Co. v. Davis, 121 Mass. 121; Bank of U. S. v. Carneal, 2 Pet. 543.

[167] Furze v. Sharwood, 2 Gale & D. 116, 2 Q. B. 416, 42 E. C. L. 726; Miers v. Brown, 11 Mees. & W. 372; King v. Bickley, 2 Q. B. 419.

[168] In the case of Willis v. Green, 5 Hill (N. Y.) 232, it was held that, where a note was made by two persons who are not partners, payment must be demanded of each maker, to charge the indorser, and also that, where two such persons indorse an instrument which is payable to their own order, upon nonpayment notice must be given to each.

[169] Chanoine v. Fowler, 3 Wend. 173; Sewall v. Russell, Id. 276; Lawrence v. Miller, 16 N. Y. 235; Stanton v. Blossom, 14 Mass. 116; Stewart v. Kennett, 2 Camp. 177. In this case it was said by Lord Ellenborough that "the notice must come from the person who can give the drawer or indorser his immediate remedy upon the bill; otherwise it is merely an historical fact." Brailsford v. Williams, 15 Md. 150.

[170] Shed v. Brett, 1 Pick. 401; Bank of Utica v. Smith, 18 Johns. 230; Renick v. Robbins, 28 Mo. 339; Swayze v. Britton, 17 Kan. 629.

[171] Firth v. Thrush, 8 Barn. & C. 387.

and so a collecting bank is an agent for transmitting notices,[172] or, more accurately speaking, is a principal for the purpose of transmitting notice of protest, and its notary who protests its paper is the agent.[173] But with these exceptions, due to the doctrine of agency that the agent is in law the same as the principal, the notice must emanate from some person who is a party to the bill. This does not mean the holder alone,[174] because, if the holder only could give notice, then he might secure his own rights against his immediate indorser, but the latter and every other party to the bill would be deprived of all remedy against the anterior indorsers and drawer, unless each of these parties should in succession take up the bill immediately on receiving notice of dishonor,—a highly unreasonable position.[175] But by a party to a bill, so far as it relates to the person who gives or is given notice, is meant some person upon whom a liability is fixed, or one who, on the paper being returned to him when he pays it, will be entitled to reimbursement from some prior party. The liability of the party must be fixed before he is competent to give notice, although he need not know it is fixed when he sends the notices out.[176] And the test between the party to the bill, in the sense we have given it, and the stranger to the bill, is whether the party giving or given the notice would be liable upon the instrument.[177] The reason for this rule is that, unless this liability is fixed, there can be no inference that the person giving the notice looks to the party to whom it is addressed for payment; whereas, on the contrary, when the liability is fixed, and the holder gives the notice, it must mean, if it means anything, that he looks to the party notified for payment.[178] This rule excludes, not only the person who is in no wise a party to the instru-

[172] Bank of U. S. v. Davis, 2 Hill, 451.

[173] Howard v. Ives, 1 Hill, 263.

[174] Tindal v. Brown, 1 Term R. 167; Chapman v. Keane, 3 Adol. & El. 193. This case held that an indorsee who has indorsed over, and is not the holder at the time of maturity and dishonor, may give notice at such time to an earlier party, and, upon afterwards taking up the bill and suing such party, may avail himself of such notice.

[175] West River Bank v. Taylor, 34 N. Y. 128.

[176] Jennings v. Roberts, 24 Law J. Q. B. 102.

[177] Harrison v. Ruscoe, 15 Mees. & W. 231.

[178] East v. Smith, 4 Dowl. & L. 744.

ment, but also the person who has been a party to the instrument and liable thereon, but whose liability is discharged. "The mischief would happen," says Parke, B.,[179] "that there might be a bill with twenty indorsements which the holder might retain twenty days after its dishonor and then recover against the drawer, on a notice then given to him by the first indorsee, which that indorsee could not do. Such a notice would be in good time if given by the first indorsee, and would therefore be bad and not support an action by the last. The rule excludes the case of notice by an acceptor who never could sue himself upon the bill after taking it up."

To Whose Benefit Notice Accrues.

Notice sent to an indorser or drawer by the holder accrues to the benefit of all preceding parties. The holder may be satisfied with giving notice to his immediate indorser, or he may give notice to the drawer and all the indorsers, and if he does it will accrue to the benefit of each indorser.[180] This rule is the natural outgrowth of the rule that notice need not be given by the holder of a bill, but can be given by any party to the instrument. For, as has just been said, the holder may only seek to secure his rights against his immediate indorser by regular notice to him alone. And in order, therefore, that the latter and every other party to the instrument may not be deprived of all remedy against anterior indorsers and the drawer, it is prudent in each party who receives a notice to give immediate notice to those parties against whom he may have the right to claim.[181] Whether there be few or many indorsers, the duty of each is the same. It is to transmit the notice from one

[179] Harrison v. Ruscoe, 15 Mees. & W. 231; Turner v. Leech, 4 Barn. & Ald. 451; Rowe v. Tipper, 13 C. B. 249.

[180] Jameson v. Swinton, 2 Taunt. 224; Hilton v. Shepherd, 6 East, 14, note; Stafford v. Yates, 18 Johns. 327; Morgan v. Van Ingen, 2 Johns. 204; Spencer v. Ballou, 18 N. Y. 327. Note—It is the rule to notify all indorsers, e. g. indorsers for collection; accommodation drawer or indorser; indorsers of bills or notes payable on demand; each partner, as well as the firm, by name; each of the joint indorsers; persons representative, if any; if none, then some authorized person at the family residence; the bankrupt personally; and to the assignee of the bankrupt. For cases, see Tied. Com. Paper, § 336, and cases cited.

[181] Bayley, Bills, p. 256; Chapman v. Keane, 3 Adol. & El. 193.

indorser to another, in the usual order of their indorsements.[182] And, in turn, as notice is received by each indorser, it accrues to the benefit of all subsequent parties. Thus, for example, if the holder notifies his immediate indorser, and he, in turn, notifies his immediate indorser, and so on, through the chain of indorsers, up to the second and first indorser, the first indorser cannot object that he has received no notice from the holder. The holder can avail himself of the notice given the first indorser by the second indorser. It is sufficient if the first indorser had notice from any subsequent holder of the note of the default of the maker, and that he would be looked to for payment.[183]

Method of Giving Notice.

The second element of process relates to the method of actually giving notice, which presents itself in two aspects. The first is giving notice verbally or in writing; the second is of serving the notice in writing personally or serving it by mail. While the requisites of verbal notices are not clearly stated by the courts, it seems to be agreed that, where no statute intervenes, a verbal notice is sufficient.[184] It also seems to be enough if, from the conversations between the parties, it can be ascertained as a fact that the party against whom the liability is sought to be enforced well understood what instrument was referred to. The courts are less strict in construing a verbal notice than in construing a written one. This is because a verbal notice communicated to the indorser, which calls forth a conversation about the instrument in question, is very different from a written notice sent to the indorser. The latter constitutes the only means which the party has to inform the

[182] Dobree v. Eastwood, 3 Car. & P. 250; Bank of Utica v. Smith, 18 Johns. 230; Mead v. Engs, 5 Cow. 303; West River Bank v. Taylor, 34 N. Y. 128; Morgan v. Woodworth, 3 Johns. Cas. 89.

[183] Stafford v. Yates, 18 Johns. 327; Spencer v. Ballou, 18 N. Y. 327; Lysaght v. Bryant, 9 C. B. 46; Wilson v. Swabey, 1 Starkie, 34; Marr v. Johnson, 9 Yerg. 1; Triplett v. Hunt, 3 Dana, 126; Stanton v. Blossom, 14 Mass. 116; Bank of United States v. Goddard, 5 Mason, 366, Fed. Cas. No. 917.

[184] Cuyler v. Stevens, 4 Wend. 566; Cayuga Co. Bank v. Warden, 1 N. Y. 413; Woodin v. Foster, 16 Barb. 146; Gilbert v. Dennis, 3 Metc. (Mass.) 495; Tindal v. Brown, 1 Term R. 167; Glasgow v. Pratte, 8 Mo. 336; Merritt v. Woodbury, 14 Iowa, 299; Boyd v. City Sav. Bank, 15 Grat. 501; Pierce v. Schaden, 55 Cal. 406.

drawer and indorser of the particular instrument dishonored. With a verbal notice, however, the drawer or indorser has full opportunity of informing himself fully of the character of the instrument and of the liability sought to be enforced against him.[185] It is almost needless to say that the verbal notice must be given to the indorser personally. Mere hearsay does not create a binding liability.[186]

The essentials of a written notice have been already described. Its service may be made by delivering it personally to the person to be charged,[187] or by leaving it at his dwelling place or place of business,[188] or it may be served upon him by mail. The object of the courts is to formulate a set of rules which, if followed, will render it reasonably certain that the notice of dishonor will reach the hand of the drawer and indorser, and charge him with notice or knowledge of his liability upon the instrument.[189] To attain this

[185] Metcalfe v. Richardson, 11 C. B. 1011; Phillips v. Gould, 8 Car. & P. 355; Thompson v. Williams, 14 Cal. 162.

[186] Woodin v. Foster, 16 Barb. 146.

[187] Smedes v. Utica Bank, 20 Johns. 372; Louisiana State Bank v. Rowel, 6 Mart. (N. S.) 506; Shepard v. Hall, 1 Conn. 329; Hartford Bank v. Stedman, 3 Conn. 489; Bank of Columbia v. Lawrence, 1 Pet. 578; Ransom v. Mack, 2 Hill, 590; Hobbs v. Straine, 149 Mass. 212, 21 N. E. 365; Johns. Cas. Bills & N. 202.

[188] Bank of Columbia v. Lawrence, 1 Pet. 578; Nevius v. Bank, 10 Mich. 547; Sanderson v. Reinstadler, 31 Mo. 483; Grinman v. Walker, 9 Iowa, 426. As to question of due diligence in ascertaining residence, see Bank of Utica v. Bender, 21 Wend. (N. Y.) 643. A person who was sent by the holder of a dishonored bill called at the house of the drawer the day after it became due, saw the drawer's wife, and told her that he had brought back the bill that had been dishonored. She said she knew nothing about it, but would tell her husband of it when he came home. The party then left, leaving no written notice. It was held that sufficient notice had been given. Housego v. Cowne, 2 Mees. & W. 348. In the case of Allen v. Edmundson, 2 Exch. 719, it appeared that the holder of an overdue note of exchange went during business hours to the counting house of the drawer, for the purpose of giving notice of dishonor; and, finding the counting-house door shut, he knocked at the door, and, no one answering, he came away without leaving any notice. It was held that these facts did not support an allegation of due notice, but were equivalent to a dispensation of notice, and ought to have been so pleaded.

[189] Bank of U. S. v. Corcoran, 2 Pet. 121; Carolina Nat. Bank v. Wallace, 13 S. C. 347; Manchester Bank v. Fellows, 28 N. H. 302; Bradley v. Davis, 26 Me. 45; Shelburne Falls Nat. Bank v. Townsley, 107 Mass. 444.

end the legislatures of many states have pointed out methods of service which, if followed, are of course legal and proper in the jurisdictions in which those legislatures are sovereign. But, in the absence of statutory regulation, the methods of service adopted by the courts are divided into two classes, according as the party giving notice and the party to whom it is given reside in the same or different places. There are various judicial interpretations of the term "residence in the same place." One, dependent upon slight authority, is that the corporate limits of the village, town, or city define the limits as to the requirements of personal notice,[190] meaning that persons residing within those limits are co-residents and without are non-residents as to each other. The second is that all persons are to be regarded as co-residents who receive their mails through the same post office, because the post office can only be used in the service of a notice as a means of transmission and not of deposit. This means that the drawer and indorser cannot be subjected to the uncertain chance of getting mail, but the holder must exert himself to make personal service or its equivalent upon him.[191] But this rule is qualified by the further one that where the drawer or indorser has no residence and no regular place of business in the city or town where the holder resides, or the instrument is payable, he may be treated as a non-resident and served by mail.[192] It being determined whether the party giving the notice and the party to whom it is given are residents of the same or different places, the following rules prevail:

[190] Barret v. Evans, 28 Mo. 333.

[191] Ireland v. Kip, 10 Johns. 490, 11 Johns. 231; Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177, 107 Mass. 444; Farmers' & M. Bank v. Battle, 4 Humph. (Tenn.) 86; Barker v. Hall, Mart. & Y. (Tenn.) 183; Forbes v. Omaha Nat. Bank, 10 Neb. 338, 6 N. W. 393. As holding that notice of dishonor sent through the mail will not be sufficient where both parties (sender, and the one to whom the notice is sent) are residents of the same town, see Sheldon v. Benham, 4 Hill (N. Y.) 129. As holding that a notice of dishonor mailed to an indorser, and received the day after that on which the note became due, was sufficient, even where the postoffice was in the same town, see Shaylor v. Mix, 4 Allen (Mass.) 351.

[192] Bank of Columbia v. Lawrence, 1 Pet. 578; Bank of U. S. v. Norwood, 1 Har. & J. (Md.) 423; Gist v. Lybrand, 3 Ohio, 307; Jones v. Lewis, 8 Watts & S. 14; Walker v. Bank of Missouri, 8 Mo. 704.

(1) If of the same place, the service must either be personal [193] or else be made by leaving at his place of domicile or of business.[194] But, as an exception to the foregoing rule, the notice may be served by mail in the following instances:

(a) If the holder can prove that the party to be charged received the notice in due time.[195]

(b) If the instrument is protested by a notary at a place different from that of the party's place of residence.[196]

(c) In large towns and cities, where letter carriers are employed to deliver letters, at the residences or places of business of parties who usually receive their letters through their hands, provided the notice be mailed early enough to reach the drawer or indorser in due time.[197]

(d) If there are several post offices in the same town, between which there is a regular communication by mail.[198]

(e) If it is the certain, clear, definite custom of a bank, in giving notice, to serve notices by mail, and this is known to the party.[199]

(2) If the parties reside in different places, or the drawer or in-

[193] Bowling v. Harrison, 6 How. 248; Williams v. Bank of U. S., 2 Pet. 96; Boyd v. City Sav. Bank, 15 Grat. 501; Peirce v. Pendar, 5 Metc. (Mass.) 352; John v. City Nat. Bank, 62 Ala. 529; Vance v. Collins, 6 Cal. 435; Davis v. Gowen, 19 Me. 447.

[194] Ireland v. Kip, 10 Johns. 491; Bank of Columbia v. Lawrence, 1 Pet. 578; Sanderson v. Reinstadler, 31 Mo. 483; Nevius v. Bank, 10 Mich. 547; Grinman v. Walker, 9 Iowa, 426. "It is well settled that, when the indorser resides at the place of the presentment and dishonor of the note, the notice must be served on him personally, or, what is deemed equivalent, must be left at his dwelling or place of business." Comstock, J., in Van Vechten v. Pryn, 13 N. Y. 549.

[195] Cabot Bank v. Warner, 10 Allen, 524; Peabody Ins. Co. v. Wilson, 29 W. Va. 547, 2 S. E. 888; Phelps v. Stocking, 21 Neb. 443, 32 N. W. 217.

[196] Hartford Bank v. Stedman, 3 Conn. 489; Warren v. Gilman, 17 Me. 360; Eagle Bank v. Hathaway, 5 Metc. (Mass.) 212.

[197] Shoemaker v. Mechanics' Bank, 59 Pa. St. 83; Walters v. Brown, 15 Md. 202; Dobree v. Eastwood, 3 Car. & P. 250; Smith v. Mullett, 2 Camp. 208.

[198] Shaylor v. Mix, 4 Allen, 351; Curtis v. State Bank, 6 Blackf. 312; Brindley v. Barr, 3 Har. (Del.) 419; Gist v. Lybrand, 3 Ohio, 307; Bell v. Hagerstown Bank, 7 Gill, 216.

[199] Thorn v. Rice, 15 Me. 263; Bowling v. Harrison, 6 How. 248; Carolina Nat. Bank v. Wallace, 13 S. C. 347.

dorser sought to be charged resides at a place other than that at which the instrument is payable,[200] the holder may make service by depositing the notice in the post office,[201] inclosed in a securely closed post-paid wrapper, and addressed to the post office at or nearest to the party's place of residence, unless he is accustomed to receive his letters at another post office, in which case it should be directed thereto.[202] The following are the specific rules as to the address:

(a) If the residence of such person is in a city or large town, it is probably sufficient to address to the city generally, and by his full name, unless it appears that the name is a common one in that city or town.[203]

[200] See the case of Chouteau v. Webster, 6 Metc. (Mass.) 1, in which a citizen of Boston indorsed a note payable at a New York bank, which the maker did not pay at maturity. The indorser was at the time in Washington, as a senator, and notice of non-payment was mailed in due time at New York, addressed to him at Washington. The indorser had a business agent in Boston, but the holder was ignorant of the fact. The notice was held sufficient.

[201] Bussard v. Levering, 6 Wheat. 102; Munn v. Baldwin, 6 Mass. 316; Miller v. Hackley, 5 Johns. 375; Friend v. Wilkinson, 9 Grat. 31; Saunderson v. Judge, 2 H. Bl. 509; Phelps v. Stocking, 21 Neb. 443, 32 N. W. 217; Wooley v. Lyon, 117 Ill. 244, 6 N. E. 885.

[202] Bank of Columbia v. Lawrence, 1 Pet. 582; Mercer v. Lancaster, 5 Pa. St. 160. In this case it was held that a notice of dishonor was sufficient, if addressed to an indorser at the postoffice where he is in the habit of receiving his mail, although such office is not nearest to his residence. Citizens' Nat. Bank v. Cade, 73 Mich. 449, 41 N. E. 500; Northwestern Coal Co. v. Bowman, 69 Iowa, 150, 28 N. W. 496. Where there are two postoffices in the town where the indorser resides, it will be sufficient, prima facie, if notice be addressed to him at the town generally. This may, however, be rebutted by proof of the indorser's custom of receiving his letters at one office, and by proof that the holder might, by reasonable diligence, have ascertained this. Morton v. Westcott, 8 Cush. (Mass.) 425.

[203] True v. Collins, 3 Allen, 440; Morse v. Chamberlin, 144 Mass. 406, 11 N. E. 560; Riggs v. Hatch, 16 Fed. 840. This doctrine is disputed. Walter v. Haynes, Ryan & M. 149. In this case it was held that a letter directed, "Mr. Haynes, Bristol," containing notice of the dishonor of a bill, was proved to have been put in the postoffice. It was held that this was not sufficient proof of notice, the direction being too general to raise a presumption that the letter reached the particular individual charged. See, however, Mann v. Moors, Ryan & M. 249.

(b) If the party live at one place and receive his letters at another post office, notice may be sent to either.[204]

(c) Mailing to any address given by the drawer or indorser for that purpose will be sufficient.[205]

(d) If the party to be charged, unknown to the holder, changes his place of residence after drawing or indorsing the bill or note, the holder may nevertheless still address the notice to his former place of residence, provided he in good faith supposed he was addressing it to the actual place of residence of such party.[206]

Time of Giving Notice.

The third element of process relates to the time at which notice is given. Notice of dishonor cannot be given before actual dishonor of the instrument takes place.[207] This is because the law merchant insists upon a legal presentment and an actual dishonor before it fixes the liability upon the indorser. Without these the notice of dishonor is a meaningless form. The fact that the bill is unpaid is immaterial. It must be dishonored before the indorser can be liable, and hence prerequisites to the issuing of the notice are the legal formalities necessary to create a dishonor.[208] But,

[204] Bank of U. S. v. Carneal, 2 Pet. 549; Williams v. Bank of U. S., Id. 96.

[205] Importers' & Traders' Nat. Bank v. Shaw, 144 Mass. 424, 11 N. E. 666; Bank of America v. Shaw, 142 Mass. 291, 7 N. E. 779.

[206] See Munn v. Baldwin, 6 Mass. 316; Requa v. Collins, 51 N. Y. 148; Ward v. Perrin, 54 Barb. 89. In Berridge v. Fitzgerald, L. R. 4 Q. B. 639, a bill was shown to have been drawn on a company, and accepted by the manager. The defendant and another director indorsed. At maturity the bill was not paid, as the affairs of the company were being wound up. The plaintiff did not know the defendant's place of residence, so he sent the notice to him at the company's office. The defendant had for some time ceased to come there, since the company had become embarrassed. The notice was held to be good under the circumstances. In the case of Rawdon v. Redfield, 4 Sandf. (N. Y.) 178, it was shown that at the date of the note the indorser lived in Troy, but before maturity of the note he moved to New York. His name was not in the directory, however, and the notary who protested the bill in New York, being informed by the holder and acceptor, that Troy was the place of residence of the indorser, mailed him a notice to that place. This was held to be sufficient notice. In the case of Beale v. Parrish, 20 N. Y. 407, 411, it was held by Grover, J., that "inability to discover the residence of the indorser excuses the proper service only so long as such inability continues."

[207] Jackson v. Richards, 2 Caines, 343.

[208] Nicholson v. Gouthit, 2 H. Bl. 609; Jackson v. Richards, 2 Caines, 343.

the dishonor being once fixed, the holder has a reasonable time to take steps to fix the liability of the parties responsible over to him upon the bill or note. The meaning of this term "reasonable time" has become established by universal usage. He may, it is true, give notice at once, but all that is required of him is reasonable diligence. Reasonable diligence is regulated by practical convenience and the usual course of business. Between parties living in the same place, the holder has until the expiration of the following business day to give notice. He may give it within banking hours at the bank, within business hours at the countinghouse or place of business,[209] and within the hours of rest at the dwelling place.[210] Between parties living in different places, the notice must be put into the post office in time to go by a mail of the day next succeeding the last day of grace, or the first possible or practicable mail after the day of maturity.[211] The rule at first required that notice of the default of the maker or acceptor should be put into the post office early enough to be sent by the mail of the day next succeeding the last day of grace.[212] But it often happened that the mail of the day succeeding the day of default went out at unreasonable hours, or before a reasonable time could be had for deposit-

[209] Allen v. Edmonson, 2 Car. & K. 547; Adams v. Wright, 14 Wis. 408; Garnett v. Woodcock, 6 Maule & S. 44; Parker v. Gordon, 7 East, 385.

[210] In the case of Jameson v. Swinton, 2 Taunt. 224, the bill was shown to have been dishonored on July 10th. At 4 o'clock p. m. of the same day notice was given to the last indorser. At 8 or 9 o'clock on the night of the 11th this last indorser gave the defendant notice. It was held that the last indorser gave notice soon enough to entitle him to recover against the defendant.

[211] Tindal v. Brown, 1 Term R. 167; Darbishire v. Parker, 6 East, 3; Lenox v. Roberts, 2 Wheat. 373. As holding that a letter received on Sunday need not be opened till Monday, so that notice of dishonor will be held to have been received on that day, and that transmitting such notice by next day's post is sufficient diligence, see 2 Barn. & Ald. 501, note a. In Gladwell v. Turner, L. R. 5 Exch. 59, all the parties to the bill were shown to reside in London. On the morning after the dishonor of the bill, the plaintiff, who did not know the residence of the defendant (the drawer), applied to S. for information. The latter was not at home, and the plaintiff did not obtain his information until 5:30 p. m. of the same day. He posted his notice of dishonor after 6 p. m., and it was not received that night. It was held that, under the circumstances, the notice was not too late.

[212] Bank of Alexandria v. Swann, 9 Pet. 33.

ing the notice, as, for example, soon after midnight, or at a very early hour in the morning,[213] and in such cases was sometimes made up and closed the evening preceding. For this reason the rule universally adopted has been that the notice, in order to charge the drawer or indorser, must be deposited in the post office in time to be sent by mail of the day succeeding the day of the dishonor, providing the mail of that day be not closed at an unreasonable hour, or before early and convenient business hours.[214] In case of indorsers, each party to a bill or note has the same time after receipt of notice, for giving notice to other parties, that was allowed to the holder after default, and the time in regard to them is governed by the principles we have just stated.[215] This rule, however, has its limitations. If the holder of a bill of exchange or promissory note wishes to avail himself of a notice of dishonor given by him to a remote indorser, he must give it within the time within which he is by law required to give it to his immediate indorser. And he cannot avail himself of his laches to gain another day.[216] If he could, the consequence which has already been point-

[213] Geill v. Jeremy, Moody & M. 61. In this case, it was held that a party receiving notice of dishonor of a bill of exchange need not give notice to the party above him till the next post after the day on which he himself receives the notice, although he might easily give it that day, and there is no post on the following day. Mitchell v. Cross, 2 R. I. 437; West v. Brown, 6 Ohio St. 542; Chick v. Pillsbury, 24 Me. 458.

[214] Fullerton v. Bank of U. S., 1 Pet. 605–608; Eagle Bank v. Chapin, 3 Pick. 180; Talbot v. Clark, 8 Pick. 51; Carter v. Burley, 9 N. H. 559–570; Farmers' Bank of Maryland v. Duvall, 7 Gill & J. 79; Freeman's Bank v. Perkins, 18 Me. 202; Mead v. Engs, 5 Cow. 303; Sewall v. Russell, 3 Wend. 276; Brown v. Ferguson, 4 Leigh, 37; Dodge v. Bank of Kentucky, 2 A. K. Marsh. 610; Hickman v. Ryan, 5 Litt. 24; Hartford Bank v. Stedman, 3 Conn. 489; Brenzer v. Wightman, 7 Watts & S. 264.

[215] Sheldon v. Benham, 4 Hill, 129; Howard v. Ives, 1 Hill, 263; Lawson v. Farmers' Bank, 1 Ohio St. 206, Johns. Cas. Bills & N. 203; Shelburne Falls Bank v. Townsley, 102 Mass. 177; Simpson v. Turney, 5 Humph. 419; Seaton v. Scovill, 18 Kan. 435; Bray v. Hadwen, 5 Maule & S. 68.

[216] Brown v. Ferguson, 4 Leigh, 37; Turner v. Leech, 4 Barn. & Ald. 451. In this case, Abbott, C. J., said: "The plaintiff, who ought to have received notice of the dishonor of the bill of exchange from B. on the 5th September, did not, in fact, receive notice till the 8th, and therefore he was clearly discharged by the laches of the holder. Then can he, by paying the bill, place the prior indorsers in a worse situation than that in which they would otherwise have

ed out would follow, namely, that, if there were twenty indorsers, he would have twenty days within which to give notice to the first of them. The holder has his day to give notice to any party he may seek to charge, and each of the prior indorsers in turn has his day. Each has one day to give notice to all parties against whom he intends to enforce his remedy.[217] The holder may avail himself of a notice duly given by any other party to a bill, but this notice must be given in due time by the party to the bill, by which is meant due time if he himself were serving.[218]

EXCUSES FOR FAILURE TO PRESENT OR TO GIVE NOTICE.

147. Presentment of a bill or note for acceptance or payment is not necessary:

(a) As against the drawer when he has no reason through his own fault to expect that the bill will

been? I think he cannot do so; and that, in paying this bill, he has paid it in his own wrong, and cannot be allowed to recover upon it against the defendant." Kennedy v. Geddes, 8 Port. (Ala.) 263; Stix v. Mathews, 63 Mo. 371; Carter v. Burley, 9 N. H. 558. It was decided in the case of Fitchburg Bank v. Perley, 2 Allen, 433, that an indorser of a dishonored note will be rendered liable to a subsequent indorser, if such indorser, having received a duplicate notice from notary of holder, for the prior indorser, mailed it, with the proper address, on the day of its receipt, although it did not reach its destination as soon as if it had been sent by the holder or notary.

[217] In an action by the fourth against the first indorsee of a note, all the parties to which resided in London, it was shown that the plaintiff received notice of dishonor from his indorsee on the 20th, and gave notice to his immediate indorser by a letter mailed on the evening of the 21st, but so late that it was not delivered until next morning. This was held to be such laches as to discharge all prior indorsers, though, in the course of the 22d, notice was given to second indorsee and to defendant. Smith v. Mullett, 2 Camp. 208. In the case of Howard v. Ives, 1 Hill (N. Y.) 263, it was held that "the next day" is to be construed as meaning the next business day, so that, in case of protest on Saturday, notice will be in time if mailed on the following Monday. The indorsee of a bill of exchange left it with his bankers, who presented it for payment on the 4th, when it was dishonored, and on the 5th they returned it to the indorsee, who gave notice of the dishonor to the drawer, on the 6th, by post. Such notice was held to be reasonable. Scott v. Lufford, 9 East, 347.

[218] Rowe v. Tipper, 13 C. B. 249; Dobree v. Eastwood, 3 Car. & P. 250.

be accepted or paid, but this does not excuse a failure to give notice to the indorsers.

(b) As against all parties when, by such causes as accident, superior force, sickness, absence, or death of the acceptor or maker, it was impossible, after using due diligence, to present it, but this does not excuse failure to give notice of dishonor to the drawer and indorsers.

(c) Where the person against whom the bill is sought to be enforced has been fully secured against loss by the person principally liable on the instrument, and has promised to see to the acceptance or payment of the paper, its presentment is unnecessary.

(d) Where presentment or notice of dishonor has been waived by express agreement or is implied in the acts of the parties, it is unnecessary.

The foregoing are common instances among the many which the courts construe as a waiver of the right of presentment of an instrument or notice of its dishonor. They rest upon somewhat different reasons, which it is our purpose to explain.

Where the drawer, through his own fault, has no reason to expect the bill will be paid, it is unjust to cast upon the holder the duty of presentment and notice.[219] These are steps taken to fix

[219] Terry v. Parker, 6 Adol. & E. 502. In this case it was held that if the drawer of a bill of exchange have no effects in the hands of the drawee at the time of drawing the bill, and of its maturity, and have no ground to expect that it will be paid, it is not necessary to present the bill at maturity; and if it be presented two days after, and payment be refused, the drawer is liable. Mobley v. Clark, 28 Barb. 390; Kinsley v. Robinson, 21 Pick. 327; Caunt v. Thompson, 7 C. B. 400. "The law requires notice to be given for this reason, because it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and, if the latter has notice that the bill is not accepted or not paid, he may withdraw them immediately. But, if he has no effects in the other's hands, then he cannot be injured for want of notice." Buller, J., in Bickerdike v. Bollman, 1 Term R. 405. For a holding to the same effect, by the same judge, see Corney v. Da Costa, 1 Esp. 302. In

the drawer's liability, and need only be taken when the bill was given in good faith, and after proper provision for its acceptance or payment had been made on the drawer's part. He has made a contract with the holder, one element of which was that the drawee would honor his bill when presented. And, if it can be shown that there could have been no reasonable expectation of this, the drawer can suffer no loss or injury from the failure of the holder to make a presentment to the drawee which would be fruitless if made. Notice of dishonor as to him would be an empty form, which the law will not require at the hands of the holder. But these reasons do not apply to excuse presentment and notice as to the indorsers, unless the indorsers have indorsed for the accommodation of the drawer, with knowledge of the fact that the drawer has no right to expect acceptance or payment.[220] For if the indorsers know nothing of the relation between the drawer and drawee, they may require presentment and notice, although the drawer cannot.[221]

The reason of the rule would not apply also where the drawee, though he had no funds of the drawer in his hands, had promised to accept the bill for the drawer's accommodation,[222] nor would it apply where the drawer had consigned property to the drawee which he drew against,[223] nor where there is a running account

the case of Dennis v. Morrice, 3 Esp. 158, Lord Kenyon held that "the only case in which notice is dispensed with is where there are no effects of the drawer in the drawee's hands. See, also, Sands v. Clarke, 8 C. B. 751.

[220] French v. Bank of Columbia, 4 Cranch, 141; Leach v. Hewitt, 4 Taunt. 731.

[221] Carter v. Flower, 16 Mees. & W. 743; Brown v. Maffey, 15 East, 216; Bogy v. Kell, 1 Mo. 743; Warder v. Tucker, 7 Mass. 449; Rea v. Dorrance, 18 Me. 137. In the case of Turner v. Samson, 2 Q. B. Div. 23, Mellish, L. J., said: "It appears beyond all doubt that the bill was an accommodation bill, and that the drawer and the other defendants, as indorsers, all signed the bill for the accommodation of S. The question is, in substance, whether the defendant (the appellant) was entitled to notice. He was plainly not the person who was to take up the bill, and he had a right to suppose that another person would see that it was taken up. It appears to me that the defendant was in the same position as if the acceptor had been the person who was ultimately liable to pay."

[222] Walwyn v. St. Quintin, 1 Bos. & P. 652; Adams v. Darby, 28 Mo. 162; Oliver v. Bank of Tennessee, 11 Humph. 74.

[223] Dickins v. Beal, 10 Pet. 572; Grosvenor v. Stone, 8 Pick. 79.

between him and the drawer,[224] nor in any case where he had reason to expect his draft would be honored.[225] The test to be applied is whether the drawer had a legal right to expect or require that the drawee would honor his bill. If the courts can construe such a legal right or just expectation on his part, failure to present the bill, and give him notice of its dishonor, discharges him.

The second class of instances, such as war,[226] disease,[227] the sus-

[224] In the case of Hammond v. Dufrene, 3 Camp. 145, Lord Ellenborough said: "I conceive the whole period must be looked to from the drawing of the bill till it becomes due, and that notice is requisite if the drawer has effects in the hands of the drawee at any time during that interval." In Thackray v. Blackett, Id. 164, it was shown that after acceptance and indorsement, and before maturity, certain bills drawn on P. & S. were destroyed by mistake while in the hands of the acceptor. This fact was made known to the defendant (the drawer), and he was requested to give other bills. He refused, and afterwards P. & S. failed. No notice was given the defendant of dishonor, though the bills were presented on maturity. Lord Ellenborough held that "it is well settled that insolvency or bankruptcy of the acceptor does not dispense with due notice of the dishonor of the bill being given to the drawer. Then does it make any difference that the bills were destroyed before they came due? I think not; for they might still have been paid with or without an indemnity, and the defendant, not hearing that they were dishonored, might have been prevented from pressing his remedy against the acceptors. * * * If there was an open account between the parties, and the acceptors were indebted in any sum to the drawer before the bills became due, I cannot say that he must necessarily have been aware beforehand that either of them would be dishonored." See, also, Donnelly v. Howie, Hayes & J. 436.

[225] Thackray v. Blackett, 3 Camp. 164; Legge v. Thorpe, 12 East, 171. Thus, in the case of Blackhan v. Doren, 2 Camp. 503, it was held that if the drawer of a bill of exchange, when presented for acceptance, has effects in the hands of the drawees, though he is indebted to them for a much larger amount, and they, without his knowledge, have appropriated these effects to the satisfaction of the debt, he is entitled to notice of dishonor for nonacceptance, as he might expect under these circumstances that the bill would be accepted and paid. See, also, Carew v. Duckworth, L. R. 4 Exch. 313; Hopkirk v. Page, 2 Brock. 34, Fed. Cas. No. 6,697.

[226] Scholefield v. Eichelberger, 7 Pet. 586; U. S. v. Grossmayer, 9 Wall. 75; Berry v. Southern Bank, 2 Duv. 379; James v. Wade, 21 La. Ann. 548 (this case holds that the holder of commercial paper must use all other means possible to give notice to the party to be charged when by reason of circumstances the mail cannot be used).

[227] Billgerry v. Branch, 19 Grat. 393; Morgan v. Bank of Louisville, 4 Bush, 82; Norris v. Despard, 38 Md. 491; Tunno v. League, 2 Johns. Cas. 1. As

pension of commercial intercourse by superior force, such as the public and positive prohibition of commerce, occupation of a country by public enemies,[228] and the like, also exonerate the holder from presentment and notice. The interest of the public forbids such acts, and therefore the individual cannot be held responsible if he fail to perform them. Thus, the public policy forbids communication with districts infected by such plagues as the cholera or yellow fever, because public safety requires their quarantine. Hence, even if the matter be not regulated by express statute, as it is in some states, the doctrines of the common law forbid all business intercourse with the inhabitants of such districts. But the other rule of the common law, that inability to perform the terms or conditions of a contract by reason of inevitable accident or casualty constitutes no excuse for non-performance, does not apply to the presentment of negotiable instruments and notice of their dishonor, because questions of presentment and notice depend upon due diligence. The holder, if he has used due diligence in presenting the bill or note, and in notifying parties of its dishonor, has done all the law requires of him. Diligence on his part is measured by the general convenience of the commercial world, and the practicability of accomplishing the end required by ordinary skill, caution, and effort.[229] And it only requires that demand and notice must be made and given within a reasonable time after the impediment is removed. This rule also does not apply to indorsers, unless the objection applies to them. For example, where a maker or acceptor is in a beleaguered town, and so inaccessible, it is merely the presentment to him which is excused. The indorser's liability should be at once fixed by sending him notice; and, if the indorser can be notified, notice to him is not excused, for the law merchant insists on compliance with its formalities as far as they can be observed.[230]

holding that the illness of one's wife will not excuse delay in giving notice of dishonor, see Turner v. Leach, Chit. Bills & N. (10th Ed.) 332, note 13.

[228] Polk v. Spinks, 5 Cold. 431; Tardy v. Boyd, 26 Grat. 632.

[229] Windham Bank v. Norton, 22 Conn. 213; Patience v. Townley, 2 J. P. Smith (Eng.) 223; Farmers' Bank v. Gunnell, 26 Grat. 131; Schofield v. Bayard, 3 Wend. 488.

[230] Foster v. Julien, 24 N. Y. 28; Spies v. Gilmore, 1 N. Y. 321; McGruder

In cases of absence, death, or inability to discover the residence of the maker or acceptor, the question is one of diligence. When the maker of a note or acceptor of a bill has absconded, that will ordinarily excuse a demand, and notice of the fact is sufficient to hold all the indorsers.[281] Where the maker or acceptor is a seaman on a voyage, having no domicile, the indorser is liable without a demand being made;[282] and in every case where the maker or acceptor has no known place of residence, or place at which the note can be presented, the holder will in like manner be excused from making any demand whatever.[283] The commonest instance of this last general statement is where the maker or acceptor removes from the state, and continues to reside abroad until its maturity. It is deemed in such cases a better business rule that the holder shall not be bound to seek out the maker or acceptor or his place of residence in the state to which he has removed for the purpose of presenting the instrument and demanding payment.[284] It is probably also the law that he is not bound to present it at the last known place of residence or business of the maker or acceptor, though the cases are not explicit on this point. The most that is said is that a presentment will be sufficient if made at the last known place of residence or of business;[285] but it probably would not be enjoined upon the holder that it be done, because such a formality would be of no practical value. In case of death of the maker or acceptor, the general principle which we have stated above governs the case. If the instrument is made payable at a bank or other particular place, it must be still presented there. If its presentment be impossible, because of the death of the maker or acceptor, and no one can be found to whom to make presentment,

v. Bank of Washington, 9 Wheat. 598. In this case, it was held that a removal to another state by the maker excuses actual demand. Juniata Bank v. Hale, 16 Serg. & R. 157; Gibbs v. Cannon, 9 Serg. & R. 201.

[281] Putnam v. Sullivan, 4 Mass. 45; Lehman v. Jones, 1 Watts & S. 126; Taylor v. Snyder, 3 Denio, 145.

[282] Barrett v. Wills, 4 Leigh, 114.

[283] Erwin v. Adams, 2 La. 318; Adams v. Leland, 30 N. Y. 309.

[284] Anderson v. Drake, 14 Johns. 114.

[285] Adams v. Leland, 30 N. Y. 309; Foster v. Julien, 24 N. Y. 28; McGruder v. Bank of Washington, 9 Wheat. 598; Dennie v. Walker, 7 N. H. 199; Wheeler v. Field, 6 Metc. (Mass.) 290; Herrick v. Baldwin, 17 Minn. 209 (Gil. 183); Gist v. Lybrand, 3 Ohio, 308; Central Bank v. Allen, 16 Me. 41.

its presentment will be excused. If a personal representative has been appointed, presentment and demand must be made to him.[236] And if there is no personal representative, and at the time of his death the maker or acceptor had a known place of residence, presentment should be made at his former residence.[237] In this case, as in all others, the death of the acceptor or maker never dispenses with notice to the drawers and indorsers of the fact of non-acceptance or of non-payment.[238]

Waiver of Notice.

The third class of cases mentioned in the principal text is what is known as "waiver." It may be of two kinds: (1) Expressed in words; or (2) implied from acts.[239] It rests upon the doctrine of estoppel; for, when presentment of a bill or note at maturity or notice of its dishonor has been dispensed with by prior agreement, it would be a fraud upon the holder to hold him to the law merchant, and to permit him to suffer by acting upon the assurance of the party to whom he looks as security upon the paper. And it is fair that this should be enforced against the indorser, for the conditions of presentment and demand are for his benefit alone, and, if he chooses to waive them, he is to be estopped from denying his waiver. The commonest forms of express waiver are the words "presentation and protest waived," or "notices and protest of non-acceptance waived," or words similar in form and import, written or printed on the face of the bill, or over some or all the indorsements, or else on a separate piece of paper.[240] Where it is written on the face of the bill or note, it applies to all the parties.[241] Where it is written over some or all the indorsements, it applies only to those indorsements over which it is written.[242] Where it is written on a

[236] Magruder v. Union Bank of Georgetown, 8 Curt. Dec. 299, 3 Pet. 87; Toby v. Maurian, 7 La. 493; Harp v. Kenner, 19 La. Ann. 63; Gower v. Moore, 25 Me. 16; Shoenberger v. Lancaster Sav. Inst. 28 Pa. St. 459.

[237] Bank of Washington v. Reynolds, 2 Cranch, C. C. 289, Fed. Cas. No. 954

[238] Oriental Bank v. Blake, 22 Pick. 208.

[239] Fuller v. McDonald, 8 Greenl. 213. Porthouse v. Parker, 1 Camp. 82.

[240] Spencer v. Harvey, 17 Wend. 489.

[241] Bryant v. Merchants' Bank, 8 Bush, 43; Farmers' Bank of Kentucky v. Ewing, 78 Ky. 266; Lowry v. Steele, 27 Ind. 170.

[242] Woodman v. Thurston, 8 Cush. 157; Central Bank v. Davis, 19 Pick. 373.

separate piece of paper, the instrument is to be construed according to its terms. In extent, the waiver is construed to apply only to the acts which it specifies. Sometimes notice alone is waived;[243] sometimes presentment; sometimes protest, in which last case the term "protest" is deemed to include all the formal facts which constitute dishonor.[244] Any act, course of conduct, or language of the drawer or indorser calculated to induce the holder not to make demand or protest or give notice, or to put him off his guard, or any agreement by the parties to that effect, will dispense with the necessity of taking these steps as against any party so dealing with the holder.[245] The reason for this is that the conditions of demand and notice are for the benefit and protection of the drawer and indorser; and when his acts are such that the court cannot protect him without sanctioning a fraud or wrong, or when the drawer and indorser himself waives these proceedings, and consents to be bound without them, he is bound. A party to a contract may renounce the benefit of any stipulation in it designed for his own protection.[246]

When Drawer or Indorser is Secured.

The fourth and last class is when the drawer or indorser is fully secured, and has promised to see to the payment of the paper,[247] and so there is no reason for the enforcement of the rule in his behalf. As we have already said, one of the principal objects of no-

[243] Backus v. Shipherd, 11 Wend. 629; Berkshire Bank v. Jones, 6 Mass. 524; Burnham v. Webster, 17 Me. 50.

[244] Coddington v. Davis, 1 N. Y. 186; Porter v. Kimball, 53 Barb. 467.

[245] Story, Bills, § 317; Andrews v. Boyd, 3 Metc. (Mass.) 434; Norton v. Lewis, 2 Conn. 478; Taunton Bank v. Richardson, 5 Pick. 436; Leonard v. Gary, 10 Wend. 504; Boyd v. Cleveland, 4 Pick. 525; Phipson v. Kneller, 4 Camp. 285, 1 Starkie, 116. In this case Lord Ellenborough said: "No legal proposition can be more clear than that where a party says: 'My residence is immaterial. I will inquire whether the bill is paid,'—he thereby takes upon himself the onus of making inquiry, and dispenses with notice." Whitfield v. Savage, 2 Bos. & P. 277; Mead v. Small, 2 Greenl. 207; Hoover v. McCormick, 84 Wis. 215, 54 N. W. 505, Johns. Cas. Bills & N. 134.

[246] Sheldon v. Horton, 43 N. Y. 93; Pugh v. McCormick, 14 Wall. 361; Reynolds v. Douglass, 12 Pet. 497; Cady v. Bradshaw, 116 N. Y. 188, 22 N. E. 371; Ross v. Hurd, 71 N. Y. 14.

[247] See reasons and cases cited; Tied. Com. Paper, § 362.

tice is to enable the indorser to obtain indemnity from the principal, and this has already in such case been attained. But the mere precaution by an indorser of taking security from his principal does not operate as a dispensation of a regular demand and notice. There must be something more, such as taking into his possession the funds or property of the principal, sufficient for the purpose of meeting the payment of the bill or note, or he must have an assignment of all the property, real and personal, of the makers for that purpose. The notice is dispensed with when funds are received, and not until then.[248] But even in such cases the indorser does not dispense with the necessity of presentment for payment;[249] and also, if the security be partial, and not entire, the notice will not be dispensed with.[250] The test in such cases is whether any damage has arisen from the failure to give this notice. If it appears that no damage could have been suffered by the indorser, then presentment may be excused.[251]

[248] Spencer v. Harvey, 17 Wend. 489; Moses v. Ela, 43 N. H. 557.

[249] Seacord v. Miller, 13 N. Y. 55.

[250] Mechanics' Bank v. Griswold, 7 Wend. 166.

[251] Bond v. Farnham, 5 Mass. 170; Barton v. Baker, 1 Serg. & R. 334; Kelley v. Mayor, etc., of Brooklyn, 4 Hill, 263.

CHAPTER X.

CHECKS.

148–150. In General.
151. Checks as Negotiable Instruments.
152–154. Presentment and Notice of Dishonor—Effect of Delay.
155. Rights of Holder against Bank.
156–159. Certification and Acceptance of Checks.
160. Failure of Bank to Honor a Check.

IN GENERAL.

148. A check is a draft or order on a bank or banker, purporting to be drawn on a deposit of funds, for the payment, at all events, of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand.[1]

149. A check resembles an inland bill of exchange payable on demand, except that it is always drawn on a banker; and many, but not all, of the rules governing a bill, are applicable to it.

150. In some, but not all, states, an instrument, in the form of a check, drawn in one state on a banker in another state, is held to be a foreign bill of exchange, and not a check.

The following is the ordinary form of a check:

Chicago, Ill., Aug. 1st, 1895.

First National Bank of Chicago, Ill.

Pay to Adam Smith or order [*or to Adam Smith simply, or to Adam Smith or bearer, or simply to bearer*]

Five hundred and $^{50}/_{100}$.....Dollars.

$500 $^{50}/_{100}$ John Jones.

[1] Van Schaack, Bank Checks, 1, citing Blair v. Wilson, 28 Grat. (Va.) 170; Story, Prom. Notes (7th Ed.) § 487; 2 Daniel, Neg. Inst. (3d Ed.) § 1566.

John Jones is the drawer; the First National Bank of Chicago, Ill., is the drawee; Adam Smith is the payee; and the payee, while he holds the check, or any person who holds it by transfer from him, is called the "holder."

A check is in form similar to an inland bill of exchange, the only difference being that it is drawn on a bank or banker. The English bill of exchange act defines a check as a "bill of exchange, drawn on a banker, payable on demand." As we shall presently see, more at length, however, a check is not a bill of exchange, though it is similar in form, and though many of the incidents of a bill attach to it. In view of its resemblance to a bill in form, the rules governing the form of bills, their alteration, the capacity of the parties thereto, etc., apply to it, and it is unnecessary to do much more than refer to what has been said in this regard in speaking of bills. A few points, however, may well be noticed shortly.

A check, in order to render the bank liable to the drawer for failure to pay it, and to protect the bank in paying it, should it turn out to be invalid for any reason as between the drawer and payee, should be dated. The fact that a check is not dated would naturally be held sufficient to put the bank on inquiry.[2] It is even said that an undated check is never payable.[3] It need not be dated on the day of its issuance, but may be dated on a prior or subsequent day. In the former case it is called an "antedated" check; in the latter, a "postdated" check. A postdated check is payable on demand or at any time after its date. To be a check, the order must be drawn on a bank or banker. If drawn on any other person, it is a bill of exchange, and not a check. It need not appear on the face of it that the drawee is a banker, but it is safer that this should appear, for it has been said that otherwise a bona fide holder without

[2] Under the English bill of exchange act, it seems that a check, like a bill of exchange, need not be dated; that, when undated, it is payable on demand, "because no time of payment is expressed." Smith, Bills, C. & N. 127. If there is a blank left for the date, the holder has implied authority to insert the true date; but if he inserts an untrue date, without the drawer's consent, he alters the check, and an alteration of the date renders the check void. See Van Schaack, Bank Checks, 2, 3; Crawford v. West Side Bank, 100 N. Y. 50, 2 N. E. 881.

[3] Van Schaack, Bank Checks, 2, citing Morse, Banks (2d Ed.) 253.

knowledge that it is drawn on a banker may treat it as a bill of exchange. Like a bill, a check must contain an order; the order must be for the payment unconditionally and at all events; and it must be for the payment of a certain sum of money. Though the contrary has been held in some jurisdictions,[4] yet by the great weight of authority it is essential that a check shall be payable instantly on demand; so that if an instrument, though otherwise in the form of a check, and drawn on a bank, orders payment on a day subsequent to its date, it is not a check, but a bill of exchange, and subject, therefore, to all the rules governing bills of exchange,—the rule, for instance, allowing days of grace.[5] A check must order payment to a person named in it, or to a person or his order, or to a person or bearer, or simply to bearer without naming any particular payee. Failure to designate a payee, or to designate him with sufficient certainty, will render the check void.[6] A check payable to a person named is transferable by his indorsement in the same manner as if payable to his order. A check payable to a fictitious person, or order, or to a name or figure not standing for any person, as "Bills Payable," "Rent," "1658," etc., or order, are in law regarded as payable to bearer, and are transferable by delivery.[7] A check must, of course, be signed by the drawer, but the place of the signature is immaterial, provided it appears to have been intended as a signature; and it may be in pencil, or printed, or stamped, or it may be the drawer's mark.[8] The points of difference between a check and a bill of exchange will be presently shown.

[4] In re Brown, 2 Story, 502, Fed. Cas. No. 1,985; Champion v. Gordon, 70 Pa. St. 474.

[5] Bowen v. Newell, 8 N. Y. 190; Bull v. Bank of Kasson, 123 U. S. 105, 8 Sup. Ct. 62; Morrison v. Bailey, 5 Ohio St. 13; Woodruff v. Merchants' Bank, 25 Wend. (N. Y.) 673; Harker v. Anderson, 21 Wend. (N. Y.) 372; Minturn v. Fisher, 4 Cal. 36; Brown v. Lusk, 4 Yerg. (Tenn.) 209; Georgia Nat. Bank v. Henderson, 46 Ga. 487; Bradley v. Delaplaine, 5 Har. (Del.) 305.

[6] Van Schaack, Bank Checks, 6; Daniel, Neg. Inst. (3d Ed.) § 1570.

[7] Vere v. Lewis, 3 Term R. 183; Willets v. Phœnix Bank, 2 Duer (N. Y.) 121.

[8] Van Schaack, Bank Checks, 7, 8. And see Brown v. Butchers' & Drovers' Bank, 6 Hill (N. Y.) 443; Shank v. Butsch, 28 Ind. 19; Com. v. Ray, 3 Gray (Mass.) 441, 447; Pennington v. Baehr, 48 Cal. 565.

Memorandum Checks.

It is necessary to notice shortly a class of checks of a peculiar character, known as "memorandum checks." In form and appearance a memorandum check does not differ from ordinary checks, except that on the face of them is written the word "memorandum," or "mem.," or "memo." Such a check "is given by the maker to the payee rather as a memorandum of indebtedness than as a payment. Between those parties it is considered as a duebill, or an I. O. U. It can be sued upon as a promissory note, without presentment to the bank, whereas the holder of a regular check must first demand its payment at bank, and be refused, before he can maintain an action against the drawer."[9] The fact that the word "memorandum," or "mem.," or "memo.," is written on a check, makes it a memorandum check. The bank, however, is not bound to pay any attention to these words, or to recognize any contract as implied between the maker and payee which gives the check any peculiar character. If such a check is presented for payment, and the drawer has sufficient funds to meet it, the bank must honor it like any ordinary check. If the agreement between the maker and payee is that it shall not be presented for payment, any remedy of the drawer for the breach of such agreement is solely against the payee.[10]

A memorandum check presents all the features of other negotiable instruments when transferred or indorsed to a bona fide holder for value.[11] "A memorandum check is a contract by which the maker engages to pay the bona fide holder absolutely, and not upon a condition to pay if the bank upon which it be drawn should not pay upon presentation at maturity, and if due notice of the presentation and nonpayment should be given."[12]

Drafts on a Bank in Another State.

It would seem that a draft in the form of a check drawn in one state on a bank in another state should not be regarded as a check, but as a foreign bill of exchange, and therefore subject to the rules

[9] Van Schaack, Bank Checks, 184.

[10] Morse, Banks, 313.

[11] Van Schaack, Bank Checks, 185.

[12] Franklin Bank v. Freeman, 16 Pick. (Mass.) 535. See, also, as to this class of checks, Cushing v. Gore, 15 Mass. 69; Dykers v. Leather Manufacturers' Bank, 11 Paige (N. Y.) 612.

governing those instruments ;[13] but the question has not been expressly decided, and there are intimations to the contrary.[14]

CHECKS AS NEGOTIABLE INSTRUMENTS.

151. A check is not a bill of exchange, but it is in the nature of a bill of exchange payable on demand, and is governed by most of the rules applicable to such an instrument. It is subject to the same rules as regards transfer, indorsement, and negotiability.

A check is defined in the English bills of exchange act as "a bill of exchange drawn on a banker payable on demand," and it is also thus defined by some text writers and judges.[15] But, though it is true that it is in the form and nature of an inland bill of exchange payable on demand, and though it is governed by most of the rules applicable to such an instrument, it is not a bill of exchange, but a distinct commercial instrument.[16]

It differs from a bill of exchange, for instance, in that it is an appropriation of so much money of the drawer in the hands of the banker on whom it is drawn, for the purpose of discharging a debt or liability of the drawer to a third person; whereas it is not necessary that there should be money of the drawer in the hands of the

[13] Dickins v. Beal, 10 Pet. 572, 579; Bank of U. S. v. Daniel, 12 Pet. 32, 52.

[14] See Roberts v. Corbin, 26 Iowa, 315; Little v. Phenix Bank, 2 Hill. (N. Y.) 425.

[15] See Whistler v. Forster, 14 C. B. (N. S.) 248; Chalm. Bills Exch. 245; McLean v. Clydesdale Banking Co., 9 App. Cas. 95.

[16] Blair v. Wilson, 28 Grat. (Va.) 170; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 647; Lynn v. Bell, 10 Ir. C. L. 490; Keene v. Beard, 8 C. B. (N. S.) 380; Hopkinson v. Forster, L. R. 19 Eq. 76; Mullick v. Radakissen, 9 Moore, P. C. 69. "In a sense, undoubtedly, a check is a species of bill of exchange, and in a sense, also, it is a distinct commercial instrument; but according to the understanding of merchants, and according to our statutes, these instruments were checks, and not bills of exchange. 'A check is an order to pay the holder a sum of money at the bank, on presentment of the check and demand of the money. No previous notice is necessary; no acceptance is required or expected; it has no days of grace. It is payable on presentment, and not before.' Bullard v. Randall, 1 Gray, 605, 606." Minot v. Russ, 156 Mass. 458, 31 N. E. 489.

drawee of a bill of exchange.[17] It also differs from a bill of exchange, as we shall see, in that, in the case of a bill of exchange, the drawer is discharged by default of the payee or holder in making due presentment to the drawee, and in giving notice in case of dishonor, while, in the case of a check, the drawer is not discharged by delay in presentment, or in giving notice of dishonor, unless the delay was unreasonable under the circumstances, and, further than this, unless the drawer was prejudiced thereby, as by failure of the banker before presentment.[18] A check is not due until payment is demanded, and the statute of limitations runs only from that time.[19] It further differs from a bill of exchange in that it is always drawn upon a bank or banker;[20] and that it is payable immediately upon presentment, without the allowance of any days of grace;[21] and that it is never, as a matter of right, presentable for acceptance, but only for payment,[22] though, if the holder requests and the banker chooses, the latter may accept it. A foreign bill of exchange must be protested to hold the drawer or an indorser; but a check, unless drawn out of the state, in which case perhaps it would be regarded, not as a check, but as a foreign bill of exchange, need not be protested.

A check, however, is, as stated above, in the nature of an inland bill of exchange payable on demand, and is precisely like a bill of exchange in its incidents, except as above stated. Like a bill of exchange, it is a negotiable instrument, if negotiable in form, and it is subject to the same rules as regards its transfer. It may be transferred by indorsement, for instance, and the indorsement will impose upon the indorser the ordinary liabilities which flow from the

[17] Per Byles, J., in Keene v. Beard, 8 C. B. (N. S.) 372. Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604.

[18] Per Byles, J., in Keene v. Beard, supra. Post, p. 388; Merchants' Nat. Bank v. State Nat. Bank, supra; Lester v. Given, 8 Bush (Ky.) 360; In re Brown, 2 Story, 502, Fed. Cas. No. 1,985.

[19] Merchants' Nat. Bank v. State Nat. Bank, supra.

[20] Morse v. Massachusetts Nat. Bank, Holmes, 209, Fed. Cas. No. 9,857; Merchants' Nat. Bank v. State Nat. Bank, supra; In re Brown, supra.

[21] Morse v. Massachusetts Nat. Bank, supra; Merchants' Nat. Bank v. State Nat. Bank, supra; In re Brown, supra; Bowen v. Newell, 8 N. Y. 190; Woodruff v. Merchants' Bank, 25 Wend. (N. Y.) 673.

[22] Morse v. Massachusetts Nat. Bank, supra; In re Brown, supra.

indorsement of a bill of exchange or negotiable promissory note.[23] And it makes no difference that the check was payable to bearer, for, like a bill or note payable to bearer, though it is transferable by mere delivery, it may also be transferred by indorsement of the payee, or of any subsequent holder. In such a case the indorser incurs the same liabilities and obligations as the indorser of a check, bill, or note payable to order.[24]

A check, whether uncertified or certified, as will be presently explained, by the bank upon which it is drawn, passes to a bona fide purchaser or transferee for value free from all equities existing between the drawer and the payee or first holder of which the transferee had no notice, whether the check is payable to bearer and transferred by delivery merely or by indorsement and delivery, or is payable to order and is transferred by indorsement and delivery.[25] In the latter case indorsement is necessary to protect the holder.[26] The principles governing the transfer of checks are in this respect the same as those which govern the transfer of negotiable bills and notes. A check not being due until payment is demanded, it cannot, as a rule, until then be treated as overdue, and it may at any time be transferred to a bona fide holder; but it is held in most jurisdictions where the question has arisen that, if the check is "stale" when transferred, it is to be regarded in respect to its transfer like an overdue bill or note, so that the transferee will not be protected against equities.[27]

In Keene v. Beard,[28] where it was held that a check can pass

[23] This was held in Keene v. Beard, supra. The name written on the back of the check must be intended as an indorsement. There must be an animo indorsandi. Keene v. Beard, supra.

[24] Keene v. Beard, supra; Story, Prom. Notes, § 132.

[25] Willets v. Phœnix Bank, 2 Duer (N. Y.) 121; Whistler v. Forster, 14 C. B. (N. S.) 248.

[26] Whistler v. Forster, supra. In this case it was held that while the bona fide indorsee, for value and without notice, of a check payable to order, is protected against equities between the drawer and the bank, a person to whom a check payable to order is transferred unindorsed is not so protected, as the transfer is a mere equitable assignment.

[27] This will be shown presently. Post, p. 398.

[28] 8 C. B. (N. S.) 372.

by indorsement, and the indorser is liable as on an ordinary negotiable instrument, the holder of a check payable to the payee or bearer, and indorsed and delivered by the payee to a third person, and by the latter to the present holder, sued the payee on his indorsement, and it was held that he was entitled to recover.[29] "The point urged" by counsel for the defendant, it was said by Erle, C. J., "was that a check is not to be classed with bills of exchange so far as to be capable of creating a liability in an indorser to the person who may be the holder or bearer of the instrument. I think he has failed to establish that proposition. A check is strongly analogous to a bill of exchange in many respects. It is drawn upon a banker; and, though in practice the banker does not accept the draft, he might, for aught I know, do so. A check has also some of the incidents of a bill of exchange, if not all; as, in respect of its passing by delivery,[30] and also in respect of a bona fide holder taking it for value having a better title than the person from whom he received it. Having these incidents of a bill of exchange, has it the further incident of being capable of passing by indorsement? that is, where the indorsement is made, not by merely placing the name of the party on the back of the instrument, but doing so with the intention of passing the title to it, and of incurring all the usual liabilities of an indorser of a negotiable instrument? It is admitted here that the defendant's name was placed upon the check animo indorsandi, and therefore our judgment for the plaintiff is in accordance with the real intention of the parties. The indorser intended to give the indorsee the security of his name and liability on the instrument. I also think our decision is in accordance with the law, when we hold that a check is a negotiable instrument, and capable of indorsement."

To be negotiable, a check must be in the form of a negotiable instrument. The rules governing bills of exchange in this respect

[29] The defendant in this case demurred on the ground that by indorsing the check he did not render himself liable to an action on the check at the suit of a third party, or bearer, upon the dishonor thereof.

[30] The court is here speaking of checks payable to bearer, or to A, or bearer, and not of checks payable to a person, or order.

apply equally to checks. Thus, if a check is payable, not absolutely, but on a contingency, it is not negotiable.[81]

PRESENTMENT AND NOTICE OF DISHONOR—EFFECT OF DELAY.

152. The drawer of a check is not discharged from his obligation by unreasonable delay in presentment of the check for payment, or in giving him notice of dishonor, in case of presentment and dishonor, unless he has been actually prejudiced thereby; but if he has suffered a loss thereby, as by failure of the bank, he is discharged to the extent of his loss.

153. In determining what is a reasonable time, regard must be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case. A check is to be deemed to have been presented within a reasonable time when presented according to the following rules:

(a) If the person who receives it and the banker are in the same place, it must, in the absence of special circumstances, be presented during business hours of the next secular day after it is received.

(b) If the person who receives it and the banker are in different places, it must, in the absence of special circumstances, be forwarded for presentment on the next secular day after it is received, and the agent to whom it is sent must present it during business hours of the next secular day after it is received by him.

154. STATUS OF "STALE" CHECK—If the delay in presenting a check is so unreasonable as to make the check "stale" (a year and a half, for instance, or perhaps five months, or even less), the bank will be put upon in-

[81] See Little v. Phenix Bank, 2 Hill (N. Y.) 425.

quiry as to equities of the drawer, and will pay at its peril; and the check will perhaps be treated like an overdue bill, and cease to be negotiable.

As has been seen, delay in presenting a bill of exchange either for acceptance, or for payment after acceptance, will operate to discharge the drawer from his obligation. Checks, however, in this respect, stand on a very different footing. A check is not presentable at all for acceptance, but is presentable for payment only, though the bank, as we shall see, may accept it if it chooses and the holder so desires. And there is no fixed rule as to the time within which a check must be presented for payment. It is payable on demand, and demand may be made at any time within the period of the statute of limitations. Certain consequences may result, however, from delay in presenting a check, so that, while delay may not under ordinary circumstances affect the rights of the holder, it is always unsafe.

In no case will delay in presentment discharge the drawer from his obligation either on the check or on the original consideration, unless it can be shown that he was prejudiced thereby.[82] When a man gives a check, he should see that he does not withdraw the

[82] Serle v. Norton, 2 Moody & R. 401, and Robinson v. Hawksford, 9 Q. B. 52, among many other cases, sustain this proposition. In Serle v. Norton, a check dated March 19th was not presented until April 6th, when payment was refused. The holder sued the drawer, and the latter pleaded delay on presentment. No excuse for the delay was shown, but it did not appear that the bank had failed, or that the defendant was otherwise prejudiced. The plaintiff had a verdict. In Robinson v. Hawksford, a check drawn on June 13th was not presented for payment until June 28th, when payment was refused by direction of the drawer given on the 21st. The payee sued the drawer, who pleaded delay in presentment. It was held that the delay was immaterial, since no inconvenience resulted, and that the defendant was not discharged from his liability on the check, so as to leave the plaintiff to sue on the consideration for it. There are many cases to the same effect. See Bull v. Bank of Kasson, 123 U. S. 105, 8 Sup. Ct. 62; Little v. Phenix Bank, 2 Hill (N. Y.) 425, 7 Hill (N. Y.) 359; Hoyt v. Seeley, 18 Conn. 353; Pack v. Thomas, 13 Smedes & M. 11; Purcell v. Allemong, 22 Grat. (Va.) 739; Howes v. Austin, 35 Ill. 396; Heartt v. Rhodes, 66 Ill. 351; Stevens v. Park, 73 Ill. 387; Henshaw v. Root, 60 Ind. 220; Stewart v. Smith, 17 Ohio St. 82; Kinyon v. Stanton, 44 Wis. 479.

money that is there to meet it. Allowing the money to remain there cannot prejudice him.

If the delay is unreasonable, and the drawer is prejudiced thereby, he will be discharged from his obligation, both on the check and on the original consideration, to the extent of his loss, but only to that extent.[83] Thus, if the holder of a check fails to present it within a reasonable time, and the bank becomes insolvent, so that the drawer loses the whole amount of the check which he had on deposit to meet it, the loss will fall on the holder, and the drawer will be entirely discharged. It would be unreasonable to permit the holder to allow the money to remain in the bank indefinitely at the risk of the drawer, who has no means of protecting himself. If the bank should pay the drawer 50 cents on the dollar, so that he would only lose half the amount of the check, he would only be discharged as to the other half. If he had no money at all in the bank, though the bank might have honored his check, he would not be discharged at all. In all cases there must be both unreasonable delay and prejudice. "When a loss has occurred by the check not being presented, it is necessary to inquire if there was any unreasonable delay. * * * Under ordinary circumstances, the only rule is, that, if things have continued the same, and no damage has arisen from delay of presentment, the drawer continues liable."[84] It is in this sense only that the drawer is entitled to have his check presented within a reasonable time.

In no case will the drawer be discharged unless the delay was unreasonable under the circumstances of the particular case. If the bank on which a check is drawn should fail after issue of the check, and before presentment, there being no unreasonable delay in presenting it, the loss would fall on the drawer, and he would continue liable on the check, or on the original consideration. Though the question as to what is a reasonable time for presentation of a check must depend upon the circumstances, it may be laid down as a general rule, that under ordinary circumstances, and where the payee or holder is in the same place where the bank is located, the check must be presented during banking hours of the next secular day

[83] See the cases above cited. And see Alexander v. Burchfield, 7 Man. & G. 1061.

[84] Per Lord Denman, C. J., in Robinson v. Hawksford, supra.

after the day on which it is received by him; any longer delay will be unreasonable, and at his peril.[35] If the bank is located at a distant place, the check must be mailed to that place for collection not later than during business hours of the next secular day after its receipt; and the person to whom it is sent must present it not later than during business hours of the next secular day after its receipt by him.[36] These rules apply under ordinary circumstances only. There may be circumstances under which a greater delay would not be regarded as unreasonable.[37]

In like manner, and for the same reason, contrary to the rule governing bills of exchange, the drawer of a check is not discharged by failure of the holder to give him notice of the dishonor of the check by the bank, unless he has been prejudiced thereby.[38] Notice should be given, however, within a reasonable time (ordinarily, not later than the next secular day after the bank refuses payment), so as to enable the drawer to take steps to protect himself. If such notice is not given, and the drawer is prejudiced, he will be discharged pro tanto. The notice of dishonor need not be in any particular form. It may be oral as well as written. All that is required is that the fact of dishonor shall be made known to the drawer.[39]

[35] Alexander v. Burchfield, 7 Man. & G. 1061, 11 Law J. C. P. 253; Smith v. Miller, 43 N. Y. 171; Bickford v. First Nat. Bank, 42 Ill. 238; Farwell v. Curtis, 7 Biss. 165, Fed. Cas. No. 4,690. If the day following the day the check is delivered is Sunday or a legal holiday, presentation on the next day is in time. O'Brien v. Smith, 1 Black, 99.

[36] Hare v. Henty, 30 Law J. C. P. 302; Prideaux v. Criddle, L. R. 4 Q. B. 455; Heywood v. Pickering, L. R. 9 Q. B. 428. This rule does not apply where the payee deposits the check for collection in a bank in the same place where he resides and the drawee bank is located. In such a case the check must be presented on the next secular day after it was received by the payee. Smith v. Miller, 43 N. Y. 171; Farwell v. Curtis, 7 Biss. 165, Fed. Cas. No. 4,690.

[37] See Freiberg v. Cody, 55 Mich. 108, 20 N. W. 813; Cox v. Boone, 8 W. Va. 500; Firth v. Brooks, 4 Law T. (N. S.) 467.

[38] Bull v. Bank of Kasson, 123 U. S. 105, 8 Sup. Ct. 62; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 607; Heartt v. Rhodes, 66 Ill. 351; Lester v. Given, 8 Bush (Ky.) 360; Stewart v. Smith, 17 Ohio St. 85.

[39] Williams v. Bank of U. S., 2 Pet. 96; Mills v. Bank of U. S., 11 Wheat. 431; Bank of Alexandria v. Swann, 9 Pet. 33; Bowling v. Harrison, 6 How. 248. Immaterial mistakes will not render the notice ineffectual. Mills v. Bank of U. S., supra; Dennistoun v. Stewart, 17 How. 606.

It is not necessary, in the absence of a statute, that a check shall be protested on refusal of the drawee to pay it, in order to hold the drawer thereon; but it is safer to adopt this course, for the notary's certificate will be prima facie proof of presentment and dishonor.[40] Protest, however, is not necessary. Parol evidence of presentment and refusal is sufficient.[41]

The circumstances which will excuse the holder of a check for failure to present it in accordance with the rules above stated are, with few exceptions, the same as those which will excuse the failure to present a bill of exchange. The valid excuses, which "are mostly based upon the old adage of the civil law, 'Impossibilium nulla obligatio est,'" are thus stated by Mr. Van Schaack:[42] (1) Where the drawer had not sufficient funds in the bank when it was reasonable to suppose the check would be presented; (2) where he withdrew his funds before presentment; (3) removal of the drawee bank; (4) inevitable accident or overwhelming calamity; (5) the presence of political circumstances amounting to a virtual interruption and obstruction of the ordinary negotiations of trade; (6) the breaking out of war between the country of the maker and that of the holder; (7) occupation of the country where the parties lived, or where the check was payable, by a public enemy, and suspension of commercial intercourse; (8) sudden illness or death of the holder or his agent; (9) general prevalence of a malignant disease, such as yellow fever or cholera, to such an extent as to stop all trade in the place; (10) impossibility of reaching the bank, by reason of snow, freshets, or overwhelming accidents; (11) when it was known that the check could not be paid by the bank, as because of its bankruptcy and suspension, or a public and notorious injunction issued against it.[43] Notice of the existence of these circumstances

[40] Townsley v. Sumrall, 2 Pet. 170.

[41] Buckner v. Finley, 2 Pet. 589; Burke v. McKay, 2 How. 66; Mechanics' & Traders' Ins. Co. v. Coons, 36 La. Ann. 271; Bowling v. Harrison, 6 How. 248; Williams v. Bank of U. S., 2 Pet. 96; Moses v. Franklin Bank, 34 Md. 574; Norris v. Despard, 38 Md. 491; Harker v. Anderson, 21 Wend. (N. Y.) 372; Young v. Bryan, 6 Wheat. 146; Union Bank v. Hyde, Id. 572.

[42] Van Schaack, Bank Checks, 53, 54. And see Blair v. Wilson, 28 Grat. (Va.) 165, 172; Bell v. Alexander, 21 Grat. 1, 6; Fletcher v. Pierson, 69 Ind. 281; Lovett v. Cornwell, 6 Wend. (N. Y.) 369; Rhett v. Poe, 2 How. 457.

[43] Van Schaack, Bank Checks, 53–55; Lovett v. Cornwell, 6 Wend. (N. Y.)

should be given the drawer, if unknown to him, as soon as possible and practicable, or the excuse will not avail.[44]

Status of a "Stale" Check.

While, as we have just seen, the drawer of a check is not discharged by unreasonable delay of the holder in presenting it for payment, unless prejudice can be shown to have resulted, it is always unsafe to delay presentation, not only because loss may thus discharge the drawer or indorser, but for the further reason that a "stale" check is rightly looked upon with suspicion, for checks are not supposed to remain long in circulation. The fact, therefore, that a check is stale when presented for payment has been held sufficient to put the bank upon inquiry, so that, if it pays such a check without inquiry, it will be held to have done so at its peril in case the check is for any reason invalid as against the maker.[45] It has also been held that the staleness of a check is sufficient to put a purchaser of it upon inquiry as to equities that may exist between the drawer and the payee.[46] No certain rule has been laid down for determining when a check is to be regarded as stale, nor can any rule be gathered from the decided cases. It seems that a check is not stale if it is only a few days, or even a month, old;[47] but a check has been held stale when it was a year and a half old,[48] and even where it was five months old.[49]

369; ante, p. 871, where excuses for nonpresentment of bills of exchange are shown.

[44] See Purcell v. Allemong, 22 Grat. (Va.) 739.

[45] Daniel, Neg. Inst. (3d Ed.) § 1632; Lancaster Bank v. Woodward, 18 Pa. St. 357.

[46] First Nat. Bank v. Needham, 29 Iowa, 249; Skillman v. Titus, 32 N. J. Law, 96.

[47] Lester v. Given, 8 Bush (Ky.) 357; Ames v. Meriam, 98 Mass. 294; First Nat. Bank v. Harris, 108 Mass. 514.

[48] Lancaster Bank v. Woodward, 18 Pa. St. 357.

[49] First Nat. Bank v. Needham, 29 Iowa, 249. Contra, Bull v. Bank of Kasson, 123 U. S. 105, 8 Sup. Ct. 62.

RIGHTS OF HOLDER AGAINST BANK.

155. By the weight of authority, though there are decisions to the contrary, which are controlling in the particular jurisdictions, the holder of a check has no right of action against the bank on which it is drawn for refusal to pay it, unless the bank has assumed an obligation to him by certifying or accepting it; his only remedy in such a case being against the drawer, and against the indorsers, if there are any.

It would seem that there is no privity of contract between the payee or holder of a check and the bank upon which it is drawn, and, therefore, that the payee or holder cannot maintain an action at law against the bank on its refusal to honor the check, unless the bank has expressly, or by its conduct, assumed an obligation to him; but there is upon this question a direct conflict in the authorities. Some of the courts have held that the check is an equitable assignment of the amount in the hands of the banker to the payee or holder, and that there is an implied contract between the bank and the holder, so as to render the bank liable to the latter on its refusal to pay the check.[80] By the weight of authority, however, and, it would seem, on principle, there is no assignment, nor privity of contract, and the bank is not liable to the holder of an uncertified and unaccepted check, either at law or in equity. His remedy is against the drawer, and to the drawer only is the bank liable if its refusal to pay was a breach of its contract. In an English case it was held that the holder of an uncertified check could not maintain an action at law against the bank under a statute allowing the assignee of a chose in action to sue thereon in

[80] Fogarties v. State Bank, 12 Rich. Law (S. C.) 518; Roberts v. Corbin, 26 Iowa, 315; Munn v. Burch, 25 Ill. 35; Fourth Nat. Bank of Chicago v. City Nat. Bank of Grand Rapids, 68 Ill. 398; Union Nat. Bank v. Oceana Co. Bank, 80 Ill. 212; National Bank of America v. Indiana Banking Co., 114 Ill. 483, 2 N. E. 401; Lester v. Given, 8 Bush (Ky.) 357; Weinstock v. Bellwood, 12 Bush (Ky.) 139; McGrade v. German Sav. Inst., 4 Mo. App. 330; Zeller v. German Sav. Inst., Id. 401; Senter v. Continental Bank, 7 Mo. App. 532.

his own name at law. "The bank," it was said, "has made a contract with the drawer that they will honor his checks to the amount of his account. They break that contract. How can that give a right of action to a third person? The check is but an order to pay, and not an absolute assignment of anything." [51] In Hopkinson v. Forster [52] it was held that the bank is not liable to the holder in equity. "A check is clearly not an assignment of money in the hands of a banker; it is a bill of exchange [53] payable at a banker's. The banker is bound by his contract with his customer to honor the check, when he has sufficient assets in his hands. If he does not fulfill his contract, he is liable to an action by the drawer, in which heavy damages may be recovered if the drawer's credit has been injured. I do not understand the expressions attributed to Mr. Justice Byles in the case of Keene v. Beard, but I am quite sure that learned judge never meant to lay down that a banker who dishonors a check is liable to a suit in equity by the holder." [54]

CERTIFICATION AND ACCEPTANCE OF CHECKS.

156. By certifying a check to be good, the bank assumes an unconditional obligation to the holder presenting it, and to every subsequent holder, to pay it on demand; and

[51] Schroeder v. Central Bank, 34 Law T. (N. S.) 735, per Brett, J. And see Gibson v. Cooke, 20 Pick. (Mass.) 15; Bullard v. Randall, 1 Gray (Mass.) 605; Dana v. Boston Third Nat. Bank, 13 Allen (Mass.) 448; National Bank v. Millard, 10 Wall. 152; First Nat. Bank v. Whitman, 94 U. S. 343; Chapman v. White, 6 N. Y. 412; Aetna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82; Tyler v. Gould, 48 N. Y. 682; Attorney General v. Continental Life Ins. Co., 71 N. Y. 325; Second Nat. Bank v. Williams, 13 Mich. 282; Creveling v. Bloomsbury Nat. Bank, 46 N. J. Law, 255; Loyd v. McCaffrey, 46 Pa. St. 410; First Nat. Bank v. Gish, 72 Pa. St. 13; Moses v. Franklin Bank, 34 Md. 574; National Commercial Bank v. Miller, 77 Ala. 168; St. John v. Homans, 8 Mo. 383; Case v. Henderson, 23 La. Ann. 49; Colorado Nat. Bank v. Bœttcher, 5 Colo. 185.

[52] L. R. 19 Eq. 74.

[53] This is a careless use of words. As we have seen, a check is not a bill of exchange, though similar to such an instrument. It is an order on a banker, and not a bill of exchange on a banker.

[54] Hopkinson v. Forster, L. R. 19 Eq. 74.

this obligation may be enforced by the holder against the bank. And a delay in presentment will not discharge the obligation.

157. The certification of a check at the instance of the holder discharges the drawer and indorsers from liability, but the drawer is not discharged where he himself has it certified, and puts it in circulation. The drawer will also be discharged if the holder takes the parol acceptance of the bank instead of payment.

158. Where the drawer of a check has no funds in a bank and the bank verbally promises the holder to honor the check, this, it has been held (though there are decisions apparently to the contrary), is a mere parol promise to answer for the debt of another, within the statute of frauds, and cannot be enforced. But such a promise where the bank has funds of the drawer, whether express or implied, is clearly binding as a promise to pay its own debt.

159. Where a bank pays a check to a holder under an unauthorized indorsement, and charges the amount to the account of the drawer, it is liable for the amount of the check to the true holder on demand. The action, it would seem, should be brought, not on the check, but on the promise implied in law from its receipt of the money from the drawer for the true holder's use.

Certified Checks—Liability of Bank.

A certified check is a check which the bank on which it is drawn has certified to be good, for the purpose of assuring the holders of it that it will be paid when presented. No particular form of words is necessary. All that is required is that it shall clearly appear that a certification is intended. A bank, by certifying a check as good, estops itself, as against a bona fide holder, to deny that it was valid as a draft upon the funds of the drawer, and would not, for instance, be allowed to say that it was made payable to no

one, and therefore void, for it would be held payable to bearer;[55] nor would it be allowed to dispute the genuineness of the drawer's signature, as against a bona fide holder,[56] or the sufficiency of funds in its hands to pay it.[57] In reason it would seem that the certification of a check is, as regards a bona fide holder, an absolute promise that the check will be paid on demand. It has been held in New York, however, that the certification only estops the bank from denying that the signature is genuine, and that there are sufficient funds, leaving it free to dispute the genuineness of the body of the check as to the amount or as to the payee.[58] If the officer or employé of a bank, whose regular duty it is to certify the checks drawn upon it, certifies a check in excess of his authority, the certification will nevertheless bind the bank as against a bona fide holder of the check. This, however, is a question of the law of agency.[59]

The effect of the certification of a check by the bank upon which it is drawn is not merely a declaration of the fact that the maker has sufficient funds to his credit to pay it; but it is more. It creates a new and binding obligation on the part of the bank. It is an appropriation of the funds of the drawer, to the amount of the check, to its payment, and an unconditional promise by the bank to make the payment on demand. This promise the bank impliedly makes to every subsequent holder of the check, and it may be enforced by him in an action against the bank.[60] In this

[55] Willets v. Phœnix Bank, 2 Duer (N. Y.) 121.

[56] Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 125; Commercial & Farmers' Nat. Bank v. First Nat. Bank, 30 Md. 11.

[57] Espy v. Bank of Cincinnati, 18 Wall. 621.

[58] Marine Nat. Bank v. National City Bank, 59 N. Y. 67.

[59] Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 14 N. Y. 623, 16 N. Y. 125; Meads v. Merchants' Bank, 25 N. Y. 143; Cooke v. State Nat. Bank, 52 N. Y. 106; Merchants' Bank v. State Bank, 10 Wall. 604. It is otherwise if the officer or employé has no authority to certify checks. Pope v. Bank of Albion, 57 N. Y. 126; Mussey v. Eagle Bank, 9 Metc. (Mass.) 306.

[60] This was held in Willets v. Phœnix Bank, 2 Duer (N. Y.) 121, and many other cases may be cited to the same effect. See National Commercial Bank v. Miller, 77 Ala. 168; Florence Min. Co. v. Brown, 124 U. S. 385, 8 Sup. Ct. 531; Laclede Bank v. Schuler, 120 U. S. 511, 7 Sup. Ct. 644; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604; Farmers' & M. Bank v. Butch-

respect, as we have seen, an uncertified check is on a different footing.

Delay in presenting a certified check does not discharge the bank from its obligation. "The obligation of the bank is simple and unconditional to pay upon demand; and in all such cases the demand may be made whenever it suits the convenience of the party entitled to the stipulated payment. When the business of a bank is properly conducted, it is not possible that it can sustain any loss or prejudice from this interpretation of its contract,—the contract which it makes in certifying a check; and it is only where delay may be prejudicial that the want of due diligence may be legally imputed; and operate as a bar to a claim otherwise valid. * * * There is in realty, in good sense, no distinction, in the nature of the liability created, between a certified check and a note of the bank payable on demand. Each is intended to circulate as money, each is an absolute promise to pay a specific sum upon demand, and laches in making the demand is no more imputable in the one case than in the other. The only difference between them is that the promise which in the note is expressed in the check is implied."[61]

Discharge of Drawer and Indorsers by Certification or Acceptance of Check.

The certification of a check at the instance of the holder operates as a discharge of the drawer from his liability, the holder's only remedy thereafter being against the bank; and in like manner it will operate as a discharge of prior indorsers, who, as to the holder, occupy the same position as the drawer. It is otherwise, however, if the drawer himself has a check certified and puts it in circulation. In such a case he remains also liable, unless there is some agreement to the contrary. That certification at the instance of the holder discharges the drawer was held in First Nat. Bank v. Leach.[62]

ers' & D. Bank, 14 N. Y. 623, 16 N. Y. 125; Girard Bank v. Bank of Penn Tp., 39 Pa. St. 92; Meads v. Merchants' Bank, 25 N. Y. 143; Andrews v. German Nat. Bank, 9 Heisk. (Tenn.) 211; Mussey v. Eagle Bank, 9 Metc. (Mass.) 306.

[61] Willets v. Phoenix Bank, 2 Duer (N. Y.) 121. And see the cases above cited.

[62] 52 N. Y. 350. To the same effect, see Metropolitan Nat. Bank of Chicago v. Jones, 137 Ill. 634, 27 N. E. 533; Continental Nat. Bank v. M. Cornhauser

The theory of the law, it was there explained, is that, where a check is certified to be good by the bank upon which it is drawn, the amount thereof is then charged to the account of the drawer. Every well-regulated bank adopts this practice to protect itself, and the reason therefor is so strong that the law presumes it is adopted by the banks. It follows that after a check is certified the drawer of the check cannot draw out the funds in the bank necessary to meet the certified check. The money is no longer his. If he apprehended danger from the suspected failure of the bank, he could not draw out that money, because it has already been appropriated by means of the check thus certified. As to him, it is precisely as if the bank had paid the money on the check, instead of certifying it. This, it is true, applies also to the acceptance of a time bill of exchange before it is due. When the drawee accepts, it is an appropriation of the funds pro tanto for the service and use of the payee or holder of the bill, so that the money ceases henceforth to be the money of the drawer, and becomes that of the payee or holder in the hands of the acceptor. Yet the acceptance of a time bill of exchange before due does not discharge the drawer. Its only effect is to make the acceptor the primary party to pay it. The parties to a certified check, however, due when certified, occupy a different position. There the money is due and payable when the check is certified, and the holder of the check, instead of taking it when he may, leaves it with the bank, and instead takes the bank's certificate that it is good, and its promise to pay it on demand. The law will not permit a check, when due, to be thus presented, and the money to be left with the bank for the accommodation of the holder, thus changing the position and increasing the risk of the drawer, without discharging him. If the holder, therefore, chooses to have the check certified instead of paid, he discharges the drawer, and his only remedy is against the bank.[88]

& Co., 87 Ill. App. 475; Born v. First Nat. Bank, 123 Ind. 78, 24 N. E. 173; Essex Co. Nat. Bank v. Bank of Montreal, 7 Biss. 193, Fed. Cas. No. 4,532; First Nat. Bank of Washington v. Whitman, 94 U. S. 343, 345; National Commercial Bank v. Miller, 77 Ala. 168.

[88] First Nat. Bank of Jersey City v. Leach, 52 N. Y. 350; Freund v. Importers' & T. Nat. Bank, 76 N. Y. 352; Minot v. Russ, 156 Mass. 458, 31 N. E. 489; Rounds v. Smith, 42 Ill. 245; Brown v. Leckie, 43 Ill. 497; Andrews v. German Nat. Bank, 9 Heisk. (Tenn.) 211; Larsen v. Breene, 12 Colo. 480.

The rule does not apply where the drawer himself causes the check to be certified, and then puts it in circulation. In such a case the reason for the rule does not apply, and he also remains liable.[64]

The same is true where the holder of a check takes the parol acceptance of the bank instead of payment. If the payee or holder of a check presents the check, and the bank offers to pay it, he cannot, instead of taking the money, leave it with the bank, without doing so at his own risk. If the bank fails, the drawer is discharged, and it makes no difference that the check was presented on the same day it was received, and the bank suspended soon afterwards, and refused payment, when the check was again presented on the same day. He might, it is true, have waited until the next day to present the check, without being chargeable with laches, but having presented it earlier, and having refused to receive payment when offered, he cannot hold the drawer.[65]

Verbal Acceptance or Promise by Bank to Pay Check.

A bank may render itself liable to the holder of a check otherwise than by a certification of it. It may under some circumstances render itself liable by a verbal acceptance, and a promise, express or implied from acceptance, to pay it; and under some circumstances an acceptance and promise may be implied from its conduct. If the drawer of a check has no funds in the bank, and the bank verbally

21 Pac. 498; Mutual Nat. Bank v. Rotge, 28 La. Ann. 933: Nor is an indorser discharged where he himself procures a check to be certified, and then transfers it. Mutual Nat. Bank v. Rotge, supra.

[64] First Nat. Bank of Jersey City v. Leach, supra; Minot v. Russ, supra. "When a check payable to another person than the drawer is presented by the drawer to the bank for certification, the bank knows that it has not been negotiated, and that it is not presented for payment, but that the drawer wishes the obligation of the bank to pay it to the holder when it is negotiated, in addition to his own obligation. But, when the payee or holder of a check presents it for certification, the bank knows that this is done for the convenience or security of the holder. The holder could demand payment if he chose, and it is only because, instead of payment, the holder desires certification, that the bank certifies the check instead of paying it. In one case the bank certifies the check for the use or convenience of the drawer, and in the other for the use or convenience of the holder." Minot v. Russ, supra.

[65] Simpson v. Pacific Mut. Life Ins. Co., 44 Cal. 139.

promises the holder to honor the check, it would seem clear that this is a mere parol promise to answer for the debt of the drawer, and, under the section of the statute of frauds requiring a promise to answer for the debt of another to be in writing, not enforceable against the bank. In Morse v. Massachusetts Nat. Bank,[66] a bank in which the drawer of checks upon it had no funds had verbally promised the holder to pay the checks, if deposited in some other bank, and presented through the clearing house. It was held that this was a mere parol promise to pay another's debt, within the statute of frauds, and that the holder, therefore, acquired no right against the bank. And it was held that the reasons for holding good a parol accommodation acceptance of a bill of exchange do not apply to the case of a bank check. There are cases, however, apparently sustaining the proposition that parol acceptances of checks by the bank may be enforced without regard to whether the bank has funds of the drawer.

If the bank has funds of the drawer, and verbally accepts the check, and promises the holder, expressly or impliedly, by such acceptance, to pay it, the leaving of the funds with the bank instead of withdrawing them is a sufficient consideration to support the promise; and the promise, being to pay the promisor's (the bank's) own debt (that is, the debt it owes to the drawer), is not within the statute of frauds. The holder can therefore maintain an action against the bank on such a promise.[67]

A bank is entitled to a reasonable time in which to ascertain whether the drawer's signature is genuine, and whether he has sufficient funds to meet the check, and its retention of the check for such a time cannot be construed as an acceptance of the check and promise to pay it.[68] But if it retains a check for an unreasonable time, it runs the risk of being held to have impliedly accepted the check so as to become liable to the holder to pay it.[69]

[66] 1 Holmes, 209, Fed. Cas. No. 9,857.

[67] See the cases hereafter cited. Espy v. Bank of Cincinnati, 18 Wall. 621; Mason v. Dousay, 35 Ill. 424; Bank of Rutland v. Woodruff, 34 Vt. 89.

[68] Boyd v. Emmerson, 2 Adol. & E. 184; Overman v. Hoboken City Bank, 31 N. J. Law, 563.

[69] First Nat. Bank v. McMichael, 106 Pa. St. 460. In New York it has been held that a bank is bound to know the state of its depositor's account im-

Payment on Unauthorized Indorsement.

Where a bank pays a check to a holder under an unauthorized indorsement, and charges the check to the account of the drawer, it has been held, though there is a decision to the contrary,[70] that it is liable for the amount of the check to the true holder on demand.

The action, however, it is submitted, should properly be brought, not on the check, but for money had and received,—that is, on the promise implied in law from the receipt by the bank of the amount of the check from the drawer for the use of the true holder. In Bank of the Republic v. Millard,[71] where the court held that the true holder of a check paid to another under a forged indorsement cannot sue the bank for refusing payment to him, in the absence of proof that it was accepted by the bank or charged against the drawer, it was said: "It may be, if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule ex æquo et bono would be applicable, as the bank, having assented to the order, and communicated its assent to the drawer, would be considered as holding the money thus appropriated for the plaintiff's use, and therefore under an implied promise to him to pay it on demand." In Seventh Nat. Bank v. Cook,[72] the supreme court of Pennsylvania, purporting to apply the principle above stated, held that the payment of a check to the holder under an unauthorized indorsement, the check being charged to the account of the maker, amounts to an acceptance, and binds the bank to pay the true holder on presentment. It was said in this case that "it is, in fact, an acceptance, and binds the bank as a certified check does. It is tantamount to an acceptance of a draft." It does not seem right to base this decision on the ground that the check is accepted or certified by the bank, though the court seems to have done so, losing sight, it seems, of the principle stated in Bank of the Republic v. Millard, upon which it

mediately upon presentation of his check. Oddie v. National City Bank, 45 N. Y. 736.

[70] First Nat. Bank v. Whitman, 94 U. S. 343.

[71] 10 Wall. 152.

[72] 73 Pa. St. 483. See, also, Dodge v. National Exch. Bank, 20 Ohio St. 234, 30 Ohio St. 1; Vanbibber v. Louisiana Bank, 14 La. Ann. 481.

relied. There was in fact no certification of the check, nor any acceptance of it by the bank on presentment which could be construed as a promise in fact to the true holder to pay the check. The action should not be on the theory that the bank has certified the check, but should be on the theory that, having retained the money in settling with the drawer of the check, it holds the same for the use of the true holder of the check, the action being on the promise created by law for money had and received.

FAILURE OF BANK TO HONOR CHECK.

160. A bank having funds of a depositor is bound to honor his checks to the amount of those funds, and, for a failure to do so, is liable for at least nominal damages, though no actual damage has been sustained. The bank, however, must have had a reasonable time since the deposit in which to make proper entries on its books so as to show the amount to the depositor's credit.

When a bank receives funds on deposit it impliedly contracts with the depositor that it will pay checks drawn by him to the amount of the deposit, and a failure to honor his check when there are sufficient funds to his credit is not only a breach of contract, but a tort as well, entitling the depositor to recover any damage he may have sustained, and to recover nominal damages, at least, if no actual damage has been sustained.[78] Of course, the check must be drawn

[78] It was so held in Marzetti v. Williams, 1 Barn. & Adol. 415. And see Rolin v. Steward, 14 C. B. 595; Whitaker v. Bank of England, 1 Cromp., M. & R. 744; Patterson v. Marine Nat. Bank, 130 Pa. St. 419, 18 Atl. 632; Gray v. Johnston, L. R. 3 H. L. 1; National Mahaiwe Bank v. Peck, 127 Mass. 298. The rule also applies to notes and acceptances of a depositor made payable at the bank. Whitaker v. Bank of England, 1 Cromp., M. & R. 744; Robarts v. Tucker, 16 Q. B. 560. As held in Marzetti v. Williams, supra, it makes no difference whether the action against the bank for its failure to pay a check is in form in tort or in contract. In either case it is founded on the contract, so as to allow the recovery of nominal damages. Nor does it make any difference that the contract was implied instead of express; for there is no difference between these kinds of contract except in the mode of proof.

properly, so as to raise a duty on the part of the bank to pay it.[74]

To render a bank liable for failure to honor a check, the depositor must have had a right to draw the money. A bank may refuse to honor a check if there are not sufficient funds to the credit of the depositor, after offsetting a balance of account due from him to the bank.[75] And there must be a sufficient balance to pay the check in full, for the bank cannot be required to make a part payment. The duty and authority of a bank to pay a check drawn on it by a depositor are determined by countermand of payment,[76] or by notice of the drawer's death.[77]

It is only reasonable that, after a deposit is made, the bank should be allowed a reasonable time in which to enter the credit on its books, so that the clerk whose duty it is to pay checks may know the amount to the drawer's credit. If a deposit were made with one clerk, and a check immediately presented to another, before he could have time to know of the deposit, the bank would not be liable for failure to honor the check. But if a reasonable time has elapsed between the deposit and presentation of the check the bank will be liable, notwithstanding the fact that the credit was not entered, for it must keep proper books, and conduct its business in a proper manner.[78]

[74] A bank is not bound to honor a check drawn on one of its branches by a depositor in another branch. Woodland v. Fear, 7 El. & Bl. 519; Gray v. Johnston, L. R. 3 H. L. 1.

[75] Garnett v. McKewan, L. R. 8 Exch. 10; Schuler v. Israel Bank, 120 U. S. 506, 7 Sup. Ct. 648. This applies where the balance against the depositor is at another branch of the bank. Garnett v. McKewan, supra.

[76] See Cohen v. Hale, 3 Q. B. Div. 371; McLean v. Clydesdale Banking Co., 9 App. Cas. 95.

[77] Rogerson v. Ladbroke, 1 Bing. 93.

[78] This was in effect held in Marzetti v. Williams, supra. In that case a depositor, on the 17th of the month, when he had £69 to his credit in a bank, drew a check of that date for £87. At 11 o'clock on the 19th a deposit of £40 was made. At 3 o'clock on the 19th the check was presented and payment refused. The judge held that a bank who received a sum of money belonging to his customer became his debtor the moment he received it, and was bound to pay a check drawn by such customer after the lapse of such a reasonable time as would afford an opportunity to the different persons in his establishment of knowing the fact of the receipt of such money, and directed the jury to find against the banker if they were of opinion that such a rea-

sonable time had intervened between the receipt of the money at 11 o'clock and the presentment of the check at 3. The court said that it could not be expected if a sum of money was paid to a clerk in a large banking office, and immediately afterwards a check presented to another clerk in a different part of the office, that the latter should be immediately acquainted with the fact of the deposit, but a reasonable time should be allowed for that purpose, and he told the jury that they should consider whether the banker ought or ought not, between 11 and 3 o'clock, to have had in some book an entry of the deposit which would have informed all the clerks of the state of the account. The jury found against the bank, and the verdict was sustained. See, also, Whitaker v. Bank of England, supra.

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